THE ISLAMIC LAW OF INHERITANCE

A Comparative Study of Recent Reforms in Muslim Countries

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Dedicated
to
the memory of my late father
Ghulam Hassan Khan

Preface to this Edition

This is the Paperback Edition of my book '*Islamic Law of Inheritance*' previously published by Pakistan Law House.

This book includes an Introductory Chapter on the origin and sources of Islamic Law and the Islamic schools of law. It deals with the origin, sources and development of the Islamic law of inheritance, and discusses the general principles and the exclusions from inheritance. It gives a detailed explanation of the Sunni law of inheritance as propounded and developed by the four Sunni schools of law and discusses in depth the Shia law of inheritance and its comparative analysis with Sunni law. It further analyses various reforms introduced by different Muslim countries to resolve the problems faced by orphaned grandchildren of the deceased.

A chapter on the law of Wills or Bequests is also included, which makes this book comprehensive, as it includes the law of Succession, both intestate and testamentary.

Hamid Khan
Lahore
12 September 2006

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The Historical Development of Islamic Jurisprudence

Islam, which in Arabic literally means 'surrender', provides that man should submit himself to God, surrender his soul completely to Him, and leave everything in His Hands. This message fundamentally was the message revealed to every prophet, to be delivered to his own people throughout the history of mankind, but was made final through His last Prophet Muhammad (PBUH). From the days of the Prophet, Islam was not just a religion but a complete code for living, combining the spiritual and the temporal, and seeking to regulate not only the individual's relationship with God, but all human social relationships.

The Prophet was at the same time a religious mentor, military commander, social reformer and political leader. In the words of the Quran, the Word of God was revealed to His Messenger for the guidance of mankind, to provide the heart of the Islamic faith and to lay the foundations of Islamic law and social order. The Quran sets down only general rules and provisions, leaving elucidation and detailed judgments to the Prophet, as explained in the Quranic verse:

> 'And We have revealed unto thee the Remembrance that thou mayst explain to mankind that which hath been revealed for them'.[1]

The Islamic legislation, or the *Shariah*, can be traced back to the migration (*Hijra*) of the Prophet and his followers in AD 622, from Mecca to Medina which became the nucleus of the Islamic state. The Islamic calendar dates from the beginning of the *Hijra*, AH 1, being AD 622. At that time, the answers to particular questions or statements of legal decisions were made in the form of Quranic provisions as revealed to the Prophet. These provisions embraced matters concerning the next world such as religious ritual and worship, as well as guiding principles for life in this world, including personal relations, civil obligations and punishments.

The Prophet and his companions used *ijtihad*, that is, independent and informed opinion on legal or theological issues. These did not constitute per se, a juristic source, as they were always subject to confirmation or amendment through revelations—the sole source at that time.[2]

The death of the Prophet (in AH 11, AD 632) ushered in the second phase of the development of Islamic law, covering the era of the Patriarchal Caliphs (the first four Caliphs) (AH 11–40, AD 632–661). This was the heroic age of Islamic conquest, bringing Muslim Arabs into contact with people of other races and cultures, and as a consequence, posing questions to which no answers had previously been devised or sought. The questions, which were now raised, ranged from the individual to the societal and international level, and concerned private matters within the family, contracts and obligations, and matters of public interest, whether political or administrative.

Since revelation, as a source of legislation, was no longer available after the Prophet's death, the Patriarchal Caliphs and the Prophet's Companions (*Sahaba*) formed and gave reasoned personal opinions, derived from the following three sources:[3]

a interpretation of texts, i.e., the Quranic verses and the Prophet's practices and sayings known as *Sunnah*;

b analogy (*qias*), i.e., deriving judgment from similar cases ruled upon under the Quran, *Sunnah* or previously established ruling by unanimity; or

c deduction, i.e., from the spirit of the Divine Law in the absence of any text or analogy.

Throughout the period of the first Islamic polity, in the city state of Medina, under the Prophet and the Patriarchal Caliphs, the fundamental unity between the spiritual and the temporal remained intact.

The advent of the Umayyads, the first dynasty in Islam (AH 41–132, AD 661–750), saw the first distinction between the religious and the secular. The Caliphate, although retaining its spiritual title, gave way to the empire-state and the era of the formation of juristic doctrines and the recording of legal principles and general rules.

Islamic juristic thought reached its peak during that period, starting with the death of the last Companion in the last days of the Umayyad Dynasty and spanning the whole of the Abbassid era (from the 2nd to

the 4th centuries AH, the 7th to the 10th centuries AD). Islamic jurisprudence became a discipline in its own right to which a new class of jurists devoted their lives, recording the general discursive rules and codifying the various juristic doctrines. Their rulings were derived from the texts of the Quran, the *Sunnah* of the Prophet and from the specific circumstances of their regional environments.

Various schools of Islamic juristic thought flourished, producing systematic doctrines which differed from one another according to their interpretation and knowledge of texts, their customs, social environments and political allegiances. It must be stressed, however, that the founding fathers of these doctrines presented them as plausible, non-binding opinions which ought not to be followed blindly or fanatically, and recognized the existence of other equally valid interpretations. Unfortunately, this advice went unheeded in the next stage of juristic thought, known as the era of imitation (*taqlid*) and rigidity (*jumud*), from the middle of the 4th to the 13th centuries AH, the early 10th to the 19th centuries AD.[4]

Independent juristic thought ceased and it was said then that 'the door of *ijtihad* was closed'. The imitative jurist became bound to a single doctrine from which he could not convert to another. Eventually the door of the *ijtihad* was reopened during the 13th century AH, the 19th century AD, as the impact of the West was felt in Muslim society. The Traditionalists of the previous phase were regarded as being out of touch with the times. Modern juristic thinkers, such as Jamal-ud-din Al Afghani (1838-98) and his Egyptian disciple Muhammad Abdu (1849 -1906), rebelled against stagnation and called for social and legal reforms. They disputed any paramount or exclusive authority of the basic doctrine of *taqlid* as embodied in the law recorded in the medieval manuals and claiming to represent the interpretation placed by the early jurists upon the Quran and the *Sunnah* of the Prophet. Contemporary jurists claimed the right to interpret independently the original divine texts in the light of modern social circumstances. What classical jurists interpreted as a moral exhortation was regarded by modern Islamic lawmakers as a legal condition to be enforced by the courts.

A new pluralistic eclectic jurist's stream developed, with the aim of choosing from among the various schools, those that were best suited to the needs of the modern Islamic society. This trend culminated in the compilation and enactment of the *Mejelle* or Ottoman Civil Code

1301 [1293, AH 1876]. It was made up of 1,851 articles, and was based, in principle, on the *Hanafi* juristic school. It was not, however, restricted to that doctrine since it adopted provisions from other schools which were deemed best suited to the people's interests and the spirit of modern times.

Although the Islamic law courts, known as the *Shariah* Courts, have been abolished as a separate entity in Egypt and Tunisia, the original Islamic law, known simply as *Shariah*, is still applicable in its entirety in the Arabian Peninsula. It is the *Shariah* law which is still in force in matters of personal law, including the law of succession and religious endowment (*waqf*) in all states with Muslim majorities, except Turkey.[3]

I. The Sources of Islamic Law

The sources of Islamic law are the Quran, the *Sunnah*, consensus (*Ijma*) and personal opinion (*qiyas*). The first source, the Quran, is referred to in the verse:

"So judge between them by that which Allah hath revealed."[5]

The *Sunnah*, as a source, is referred to in the Quranic verse:

"And whatsoever the messenger giveth you, take it. And whatsoever he forbiddeth, abstain (from it)."[6]

Consensus is mentioned as a source in the Quranic verse:

"And whoso opposeth the messenger after the guidance (of Allah) hath been manifested unto him, and followeth other than the believers' way."[7]

Personal opinion and reasoning are implied in the Quranic verse:

"... that thou mayst judge between mankind by that which Allah showeth thee."[8]

One specific form of personal opinion, *Istihsan*, is referred to in the Quranic verse:

"Therefore give good tidings (O Muhammad) to my bondmen who hear advice and follow the best thereof."[9]

General usage is advised in the Quranic verse:

"Keep to forgiveness (O Muhammad) ... and enjoin kindness ..."[10]

While generally accepted by virtually all schools of Islamic juristic thought, these sources are interpreted differently, and are discussed in the following sections.

(a) The Quran:

The Quran is believed by Muslims to be the living word of God revealed to His Prophet (PBUH). Its wording is as sacred as the meanings it conveys. Therefore, no translation, however thorough, bears the same weight as the Arabic original: at best it can only be an honest rendering of the meaning. The Quran's conclusive authority and infallibility are beyond question, as is its status, as the first and most highly esteemed source of Islamic law.

The Quran was revealed to the Prophet (PBUH) in Mecca and Medina, over a period of 23 years, as pronouncements of precepts or replies to questions. It consists of 114 *Surahs* of 6,342 verses, of which only 500 verses deal with the provision of law (*al-ayat-ush-shariya*); the remaining deal with beliefs and moral conduct. The Mecca *Surahs*, brief and concise, concerned cosmology, faith and moral education. The Medina *Surahs*, long and detailed, concerned legislation.[12]

The wording of a Quranic ruling is conclusive and binding (*qati*) allowing only one meaning. The text may be taken literally or interpreted metaphorically. Literal interpretation is again divided into detailed (*mufassal*) and general (*mujmal*). The detailed enunciations are either perennial (*muhkam*) or abrogate (*mansukh*). The passage abrogating an earlier one is called *nasikh*. By these means, jurists were able to solve some of the contradictions in the Quranic precepts, the later revelations abrogating the earlier. The basic rule remains that only a Quranic statement may overrule another.[13]

(b) The Tradition or *Sunnah*:

The Tradition or *Sunnah* is the second most authoritative source of Islamic legislation. Etymologically, the *Sunnah* is the path trodden, beaten and made evident by the forefathers. It can be used in several connotations:

There is the pre-Islamic *Sunnah*, i.e., the precedent of normative custom which the Arabs were bound to observe and imitate, any

deviation from which constituted an innovation that should be discarded (*bida*).

There is the *Sunnah* of the Patriarchal Caliphs, i.e., their administrative and legal acts, which some jurists dispute as binding precedents. However, the *Sunnah*, which is the second source of Islamic legal standards, is the *Sunnah* of the Prophet (*Sunnaht-un-Nabi*).

The Prophet's *Sunnah* is divided into:

i verbal utterances of the Prophet (*sunnā qualia* or Hadith);

ii acts of the Prophet (*sunna filia*); and

iii the tacit assent of the Prophet, i.e., his refraining from expressing disapproval on hearing or observing certain things said or done (*sunnā taqririyya*).

Unlike the Quran, whose word is binding and immutable, the wording of the sayings (Hadith) may change, although the meaning is binding and attributed to divine revelation. Here a distinction must be made between the content or subject matter of a Hadith and its authenticity—the course from which it derives its authority. The Islamic jurists classify the Prophet's traditions into three degrees of certitude:

a *Mutawatir*, i.e., a continuous tradition handed down through an uninterrupted chain of trustworthy witnesses. This is absolutely certain and recurs mostly in the acts of the Prophet (*sunna filia*) but is seldom found in the verbal sayings. One such rare Hadith is 'Whoever deliberately tells a lie about me shall occupy his place in Hell'.

b *Mash-hoor*, i.e., widespread. This differs from *Mutawatir* in that a link in the chain by which it is handed down is missing. An example is a Hadith narrated by Umar and later cited as such by a chain of narrators: 'Acts are judged by intention, and each shall receive according to intentions'.

Mash-hoor is a strong legislative source carrying high probability, if not certitude. One example is the ruling on the bequest left unspecified in the Quran but later limited by the jurists under the Hadith: 'One third and it is a lot'.

c *Khabar Ahad*, i.e., a Hadith attributed to the Prophet by a single witness. This constitutes the bulk of the *Sunnah*. The jurists differ over adopting this class of Hadith, but it is generally

accepted, subject to certain criteria. The Shafii School would reject any such tradition attributed by a single authority, with the exception of Said Ibn il-Musayyab. The Malikis would accept a one-source tradition if it were in conformity with legal use and custom in Medina, a position disputed by the majority of scholars.

For the Hanafis, a one-source Hadith must fulfil three conditions:

i the narrator himself should have abided therewith in his own conduct;

ii the Hadith should not cover a recurrent topic, as it should then have been narrated by many Companions; and

iii it should conform with the *Shariah* precepts.

The rulings of the *Sunnah* may be confirmatory, explanatory or complementary to the Quranic precepts.[14]

(c) Consensus or *Ijma*:

Jurists differ on the definition of consensus or *Ijma* as a source of legislation. The Ithna-Asharis and other Imami Shias restrict it to the agreement of their infallible Imams. The Kharijis would accept consensus only within their own community where they require unanimity. Some Hanbalis and their contemporary descendants, the Wahhabis of Saudi Arabia, together with the Zahiris, limit consensus to the agreement of the Companions of the Prophet. The Malikis define consensus as an agreement, firstly of the Companions of the Prophet, and secondly of the two following generations, i.e., the scholars of Medina, known as 'the followers' (*tabi-oun*) and 'the followers' followers' (*tabaout-tabieen*), since these are held to be the most thoroughly acquainted with revelation.

However, common orthodox doctrine maintains that consensus is simply the general agreement of all scholars of the Islamic community living in a certain period after the era of the Prophet's revelation, without the requirement that this agreement is unanimous. This doctrine relies on a famous tradition of the Prophet, which says that 'My community will never agree to what is wrong'.

According to this definition, consensus must comply with four conditions:

i it shall be the consensus of the scholars, an essential requirement for whom is moral purity;

ii the majority of such scholars shall agree to the legal opinion, allowing for a dissenting minority;

iii the object of their agreement shall be a legal matter liable for reasoned opinion, relating to permissibility, prohibition, validity or nullity. It cannot relate to a secular matter such as the affairs of war, or to a matter settled by revelation, such as the life beyond, or a religious matter that has already been proven conclusively;

iv the consensus shall occur long after the death of the Prophet, since, had he agreed on the opinion in question, it would have become a tacit agreement (*sunnatu taqrir*), or had he disagreed, it would have invalidated the consensus.

Consensus may be verbal, or by practical example, or by tacit agreement (*ijma'us sukut*) which is acknowledged by the majority of Hanafis and Hanbalis but dismissed by the Malikis, Shafiis, most theologians and a minority of Hanbalis.

Consensus derives from the Quran, such as in the unanimous consideration of the grandmother as a prohibited degree under the Quranic ruling that mothers are a prohibited degree; or from the *Sunnah*, such as granting the grandmother a sixth share of the estate, relying on a similar ruling by the Prophet; or from analogy, such as agreeing to the succession of Abu Bakr by analogy of the Caliphate to the leading of Muslims in prayers; or from the public interest, such as agreeing to the compilation of the Quranic texts in one volume.

In general, consensus is a conclusive argument in proving the existence of a law, or interpreting or abrogating it.[15]

(d) Reasoning by Analogy (*qiyas*):

While the previous sources are essentially conventional, deriving from divine revelation (the Quran and the *Sunnah*) or by consensus (*ijma*), analogy (*qiyas*) is a process of individual logical reasoning, sometimes being referred to as personal opinion (*raay*) or reasoned inference

(*ijtihad*). Islamic jurists define analogy as the deduction of a ruling on a case for which no provision is found in the Quran or the *Sunnah* from a similar case for which there is such a provision, on the strength of a common factor. It has, therefore, four essentials (*arkan*);

i the known case, the root (*asl*);

ii the unknown case, the derivative (*fara*);

iii the common factor, the reason (*illa*); and

iv the known ruling on the root under a text or by consensus, extendable to the derivative (*hukm-ul-asl*).

For an analogy to be valid, it has to comply with three conditions:

i that the common factor is the ground for the ruling,

ii that the reason is identical in both cases; and

iii that the ruling is general and not exceptional.

The authority of analogy is a matter of controversy among jurists. Some jurists reject it entirely. Among this school were the Zahiris.

The advocates of analogy, on the other side, invoked the Hadith according to which when the Prophet sent Muadh Ibn Jabal to Yemen as the judge, and asked him: 'How will you decide when a question arises?' Muadh replied: 'According to the Book of God'. Then the Prophet asked: 'And if you do not find the answer in the Book of God?' Muadh said: 'Then according to the *Sunnah* of the Apostle of God'. The Prophet again asked: 'And if you do not find the answer in the *Sunnah* of His Apostle?' Muadh replied: 'Then I shall come to a decision according to my own opinion without fail.' The Prophet was delighted and said: 'Praise be to God who guided the apostle of the Apostle of God to what pleases God and His Apostle'.[16]

The bulk of Islamic jurists acknowledge analogy as a course of legislation, although they do so in varying degrees; the champions being the Hanafis, the least enthusiastic being the Hanbalis (who use it as a last resort) while the Malikis and Shafiis steer a middle course. The Ithna-Asharis accord analogy much more freedom, maintaining that the gate of *ijtihad* (reasoned personal opinion)—is always open, though only to the scholars who, acting as the representatives of the absent Imam, reinterpret the *Shariah* in every generation according to its immutable principles and the actual situation of the community.[17]

2. The Islamic Schools of Law

(a) The Origins of the Juristic Schools:

During the lifetime of the Prophet, no controversy ever arose over either general principles, or the detailed particulars. Every question was decided either on the basis of Revelation or the personal opinion of the Prophet, later confirmed or rectified by Revelation.

The first controversy to arise concerned a principle related to the death of the Prophet himself. This had not been accepted by some until Abu Bakr, the first Patriarchal Caliph, read them the Quranic verse: 'Lo! thou will die, and lo! they will die'.[18] The first controversies concerning practical matters related to the succession of the Prophet and the abstention by some tribes from payment of the religious tax (*zakat*). Both issues were settled through consensus and reasoned opinion.

After the death of the Prophet, his Companions followed two separate trends when deciding on new questions from the Islamic legal point of view. The followers of the first trend, known as the Traditionalists, or the School of Hadith, adhered to the Quran and the Prophet's *Sunnah*, refraining from judging any hypothetical problem. The others, known as the School of Personal Opinion (*Al-Raay*), advocated the interpretation of the texts and analogy derived from precedents.

These two trends developed into two major schools of juristic thought following the transition from the city state to the empire, and contacts with other non-Arab cultures. The Traditionalists, concentrated mainly in Hijaz—but also with minor centres in Kufa and Syria—would never venture beyond the texts, often taking them literally, and would consider any personal opinion as heretical. They used to decide every question by first turning to the Quran, and then to the *Sunnah* of the Prophet. When they came across conflicting rulings by the Prophet, they would opt for those attributed to the most authentic narrator, failing which they would refrain from judgment. This school did not survive its founder, Az-Zahiri, who died in AH 270 (AD 880).

The School of Personal Opinion (*Al-Raay*) flourished mainly in Iraq, which was also the birthplace of the Shia and Khariji sects. The thesis of this school was that the Divine Law, the *Shariah*, was completed before the death of the Prophet, by which time it had been completed and made clear, and that it provides a rational system based on solid

principles and logical causes which explain and regulate the *Shariah* rulings. The school set themselves the task of identifying those principles and causes in order to infer judgment on actual or hypothetical problems. On the other hand, they were meticulous in ascertaining the authenticity of the Prophet's precedents lest a ruling that they made was founded on a false tradition.[19]

Although the jurists agreed broadly on the four sources of the *Shariah* namely; the Quran, the *Sunnah*, analogy and consensus, they differed widely in their interpretation of the texts, in the value they attached to analogy and in their definition of consensus. As for analogy, the jurists differed on its value in relation to a saying of the Prophet of which there was only one report. They also differed on its premises derived from the sayings and acts of the Prophet's Companions, as to whether they were desirable or in the public interest. They also differed on the definition of consensus, whether it was that of the jurists of Medina at a given time or the jurists of the Islamic Community (*Umma*) as a whole in any given period.

Custom and social environment also had a role in the controversy between jurists. But perhaps the most important divisive factor was the political differences which gave rise to the three main doctrines of Islamic legal thought, namely: the Sunni, Shia and Khariji schools.

(b) The Islamic Juristic Schools:

After the death of the Prophet, one group of Muslims maintained that his successor should be his cousin and son-in-law, Ali Ibn Abi Talib, and that succession should remain in the Prophet's family. However, on the recommendation of Ali himself, they accepted the Caliphate first of Abu Bakr and after him of Omar. The dispute was renewed on the election of Uthman, and after his assassination war broke out between the supporters of Ali and their opponents who supported Muawiya, then the Governor of Syria. Ali himself was assassinated and Muawiya founded the first royal dynasty in the history of Islam, the Umayyads. The disputes between the various groups moved to the realm of logical arguments and speculation which centred initially on the principles of the faith, giving rise to such philosophical doctrines as the *Jabria* (Determinism), the *Salafia* (Traditional Fundamentalism) and the *Mutazila* (the rationalist Islamic philosophers). These, especially the latter, represented the most authentic Islamic philosophy.[20]

The Sunnis and Shias developed their own respective jurisprudence through their own established schools of law.

(c) The Sunni Schools of Law:

The Sunnis, the 'Traditionalists' or the 'orthodox Muslims', constitute the mainstream of Islamic theology and jurisprudence. They believe that they are the exponents of the original and unadulterated Islamic orthodoxy as revealed in the Quran and in the traditions and precedents set by the Prophet and his Companions, and as elaborated by the great early Islamic thinkers. During the Islamic Age of Islamic juristic thought, numerous Sunni schools flourished. Of these, only four have survived to this day. These are the Hanafis, the Malikis, the Shafiis and the Hanbalis.

i The Hanafi School: Named After Abu Hanifa Al-Numan, (AH 80-150 circa AD 700-767), this doctrine spread during the sovereignty of the Abbasid dynasty and was the official doctrine under the Ottoman Empire and thereafter, in Egypt, Syria, Jordan, Palestine, Lebanon and the Sudan. In the present age, it is subscribed to by the Muslim population of Turkey, Albania, the Balkans, Central Asian States, Afghanistan, Pakistan, China, India and Iraq.

Abu Hanifa was meticulous about ascertaining the authenticity of any tradition attributed to the Prophet, making ample use of analogy and *Istihsan*, i.e. giving preference to a rule other than the one reached by the more obvious form of analogy. His juristic research was not confined only to factual questions, but included hypothetical cases as well. 'Legalistic devices' (*Hiyal-Shariya*) are an essential characteristic of his doctrine used in an attempt to compromise between the legal, the ideal, and the real, with the object of bridging the gap between jurisprudence and reality, and in so doing they stress the fundamental pragmatism of his own doctrine and that of the Sunni doctrines in general.

Abu Hanifa refused the highest judicial office in spite of tremendous pressures from the Caliphs. But his closest disciple, Abu Yusuf Yaqub bin Ibrahim Al-Ansari (AH 113-183, circa AD 730-798), reached the office of the Chief Justice. He amalgamated the Hanafi School of Opinion and the Hijazi School of Tradition, his judicial experience providing the link between theory and practice and helping to propagate

the Hanafi doctrine within the judicial offices, which were until then almost exclusively monopolized by Hanafi jurists.

Muhammad bin al Hassan Ash-Shaybani (AH 132-189, circa AD 750-805) was another eminent Hanafi scholar who studied under Abu Hanifa and his disciple Abu Yusuf. He then studied jurisprudence and traditions with Malik in Medina for over three years. Like his teacher, Abu Yusuf, he combined the two schools of personal opinion and tradition. He contributed most to the compilation of the Hanafi system of jurisprudence, in spite of differences of opinion between the three scholars within the school.

Later jurists referred to Abu Hanifa and Abu Yusuf as 'the two masters' (*ash-shaikhan*), to Abu Hanifa and Imam Muhammad as 'the two extremes' (*at-tarafan*) and Abu Yusuf and Imam Muhammad as 'the two friends' (*as sahiban*).[2]

ii The Maliki School: This school was named after its founder, Malik bin Anas (AH 93-179, circa AD 712-795). The Maliki doctrine is today widespread in Egypt, the Sudan, North and West Africa and the eastern central part of Arabia. At one time it was followed in Spain, due to the fact that most of Malik's disciples were Egyptian scholars who attended his lessons in Medina and after returning to Egypt, moved on to North Africa and then to Spain.

Although Medina lost its political importance when the seat of government moved first to Damascus and later to Baghdad, it retained its predominance as a seat of learning since it was the original domicile of the Prophet's Companions, Ansar and Muhajireen, and the dwelling place of the traditionalists of whom the most eminent were Aisha, the Prophet's widow, and his Companions Abdullah bin Abbas, Abdullah bin Omar and Zaid bin Thabit.

The sources of the doctrine were the Quran, the Prophet's Traditions, consensus, and analogy. The Malikis' conception of consensus differed from that of the Hanafis, in that they construed it as the consensus of the community represented by the people of Medina. They held precedents set by the Medinites above the single source traditions and analogy, to which they also preferred the ruling by the Companions deemed to be an authority on the subject.

Malik made extensive use of the sayings of the Prophet (Hadith) and did not assign to analogy the status accorded to it by the Hanafis, often deriving his rulings from the principles of public interest (*istislah*), the Hanafi (*istishab*), and a strong pragmatism. Maliki reasoned opinion was not, therefore, confined to analogy.

The difference between the doctrines of the Malikis and the Hanafis is one of degree, not of nature. They both used tradition and reasoned opinion, but with variable stress and to different extents. Both schools tolerated divergence of opinion within their doctrines.[22]

iii. **The Shafii School:** This school was named after Muhammad Ibn Idris Ash-Shafii (AH 150-204, circa AD 767-820). It was the first juristic system to be based on clear principles and distinct methods. It represents a middle course between those renouncing personal opinion and those who follow it blindly, with a slight preference for the traditions. It spread in Jordan, Palestine, Syria, Lebanon and Yemen, and has a large following in Egypt, Indonesia, the Philippines, Brunei, Darussalam, Singapore, Malaysia, Thailand, Sri Lanka and the Maldives.

Shafii, a pupil of Malik, wrote the first book ever on the principles of Islamic jurisprudence called *Ar-Risala* (The Epistle). To him, the paramount sources are the Quran and the *Sunnah*, failing which it is analogy thereon. Should a tradition of the Apostle of God be narrated as authentic by generation after generation, then it is the conclusive ruling. According to his doctrine, the consensus overrules a tradition narrated by a single authority. He held that a tradition shall have its manifest meaning attributed to it and, if liable to multiple interpretations, the nearest to its manifest purpose shall prevail; and of conflicting traditions of apparently equal validity, the most authentically attributed shall prevail.

iv. **The Hanbali School:** Named after Ahmad Ibn Hanbal (AH 164-241, circa AD 780-850), some historians did not consider this doctrine a juristic system, but described Ibn Hanbal as a traditionalist. Yet, considering the answers he gave to juristic questions put to him, compiled in a book titled *Masail* (Questions), these do reveal a juristic doctrine with an independent method and original principles.

Although fundamentalist to the extreme in its rigidity in matters of ritual, this doctrine is equally noted for its tolerant approach to

transactions, advocating allowance or non-prohibition in the absence of any text to the contrary.

The Hanbali School did not enjoy the popularity of the preceding three Sunni doctrines for a combination of reasons, among them being the exclusion of its exponents from power and judicial office, a reluctance to give personal opinion, a rejection of analogy (which they only used as a last resort when all other sources failed), and their fanatic intolerance towards other doctrines.

Later, some Hanbali leaders, such as Ibn Taymiyya (died AH 728, circa AD 1328) and Ibn Qayyim Al-Jouzia (died AH 751, circa AD 1350), did exhibit tolerance and gave personal opinion. They made Hanbali teachings known to the people, especially in matters of transactions.

During the 12th century AH (19th century AD), Muhammad Ibn Abdul Wahhab revived the Hanbali doctrine in Najd and spread it in Hijaz in the Arabian Peninsula. The Hanbali teachings are today the official doctrine of the Kingdom of Saudi Arabia.

Hanbalism derives its provisions from the Quran and the *Sunnah*, prevailing over any consensus, opinion or inference. It acknowledges, without question, an opinion given by a Companion of the Prophet if there is no dissention, otherwise the opinion of a Companion nearest to that of the Quran or the *Sunnah* shall prevail. Quite often, the Hanbalis do not indicate a preference where there were conflicting rulings by the Companions, but declare them all potentially valid. Traditions of the Prophet, according to the Hanbalis, are either valid or exhibit varying weaknesses which are nevertheless acknowledged.[24]

(d) The Shia Schools of Law:

The Arabic word 'Shia' literally means followers, party, partisans, or supporters. It occurs a number of times in the Quran with these meanings. Later, it came to mean the followers of Ali and the people of his House, a connotation that distinguishes the Shias from the Sunnis, who consider themselves the 'orthodox' Muslim denomination. Sunni historians and jurists trace the advent of Shiaism, as a religious movement, to the war between Ali and Muawiya over leadership of the Islamic community, which led to the establishment of the Muawiya's Umayyad dynasty. The Shias themselves trace their origins still further back, to the controversy over the succession of the Prophet, in what is

called the Al Saqifa affair, when allegiance was paid to Abu Bakr as the first Patriarchal Caliph. Some Companions of the Prophet maintained that Ali, the Prophet's son-in-law, was the most suitable successor, relying on various arguments which included, inter alia, that Ali was appointed by the Prophet as the standard-bearer in many wars, and that he was the Prophet's deputy at Medina during the expedition to Tabuk. Moreover, in his last public address to the largest gathering before his death three months later, the Prophet took Ali by the hand and declared: 'He of whom I am the *mawla* (patron), of him Ali is also the *mawla*. O God, be the friend of him who is his friend, and be the enemy of him who is his enemy.'[25] Ali's supporters, in order to preserve the unity of the community, reluctantly swore allegiance to Abu Bakr.

The term 'Shia' was first used in the document of arbitration at Siffin, the last battle fought between Ali and Muawiya to denote the 'party of Ali' (*Shiat Ali* or *al-Murtaiyun*), their opponents the 'party of Uthman' (*Shiat Uthman* or *al-Uthmaniyya*) and the Syrians (*Ahl ash-Sham* or *Shiat Muawiya*). *Shiat Ali* consisted of Ali's small personal following who always considered him the most worthy person to lead the community after the death of the Prophet, together with other groups who supported him for other than religious reasons.[26]

The Shias maintain that Islam has been, from the very beginning, both a religious discipline and a serious political system. The *Imamat* is believed to be a pillar of the faith, based (according to Jafar al-Sadiq, the first elaborator of the Shia Ithna-Ashari doctrine and after whom the Jaafria or Ithna-Ashari school was named) on two fundamental principles: explicit designation (*nuss*) and knowledge (*ilm*). According to the first principle, the *Imamat* is a prerogative bestowed by God upon a person chosen from the family of the Prophet, who before his death and with the guidance of God, transferred the *Imamat*, by explicit designation, to a named individual descended from Fatima and Ali the Prophet's daughter and son-in-law. According to the second principle, an Imam is a divinely inspired possessor of a special source of knowledge of religion, which can only be passed on before his death to the succeeding Imam. Thus, the Imam of the time becomes the sole authoritative source of knowledge in religious matters.

The Shia are unanimous in that the first Imam, as explicitly designated by the Prophet, was Ali, from whom the *Imamat* passed in a similar way to Hassan, then Hussein, then Hussein's son Ali Zain el-Abedeen

Thereafter, the Shias diverge into a number of sects: the Zaidis, Ithna-Ashari and Ismailiyya.

i **The Zaidia School:** It maintains that the Imam of their time was Zaid, son of Ali Zain el-Abedeen and the great grandson of Ali. Of all the Shia Schools, they differ least from the Sunnis, only diverging on certain matters. For example, they consider the animal slaughtered by a non-Muslim ritually unclean, and they prohibit marriage of a Muslim male to a Christian or Jewish woman, quoting the Quranic prohibition: 'And hold not to the ties of disbelieving women.'[28] Unlike the other Shias, they do not allow *muta* (temporary) marriage.

On the *Imamat*, they allow the validity of the proclamation of an Imam, even if another candidate appears to be better. Unlike the Ithna-Ashari, they do not require any explicit designation. To them, a sufficient qualification for any eligible Imam is to be descended from Fatima, the Prophet's daughter, to be an independent scholar, and courageous enough to revolt against the ruler claiming the *Imamat* for himself. They also differ from the Ithna-Asharis in believing that there is no specified number of Imams, and the Imam must be identified by his description and attitudes.[29]

The Zaidis are mainly concentrated in the Yemen where their Imams combined both spiritual and temporal leadership until they were ousted in the 1961 Revolution.

ii **The Ithna-Ashari School:** By far the largest Shia denomination, they derive their name (the Twelvers) from their belief in twelve Imams who were, in chronological order:

1	Ali Ibne Abi Talib	(d. AH 40/AD 661)
2	Hasan	(d. AH 49/AD 669)
3	Hussein	(d. AH 61/AD 680)
4	Ali Ibn-ul-Hussen (ZAINUL ABEDEEN)	(d. AH 95/AD 714)
5	Muhammad ul-Baqir	(d. AH 115/AD 733)
6	Jafar us-Sadiq	(d. AH 148/AD 765)
7	Musa al-Kazim	(d. AH 183/AD 799)
8	Ali ar-Rida	(d. AH 203/AD 818)
9	Muhammad ul-Jawad at-Taqi	(d. AH 220/AD 835)

language. On inheritance, they allow a Muslim to inherit from a non-Muslim, but not vice versa.

On marriage, they allow the marriage of a Muslim male with a Christian, Jewish or magi woman, although they consider it repugnant (*makruh*). They allow the *muta*, or temporary marriage, to a woman free of any legal impediment, under a binding contract and for a fixed dower, giving effect to entitlement of the offspring to inheritance and the wife counting her *iddat* (waiting period) on the expiry of the contract during separation or before it.

The Ithna-Ashari doctrine has been the state religion in Iran since the 16th Century AD (10th century AH). It has considerable following in Iraq, Lebanon, Syria, Pakistan and Afghanistan.[32]

iii **The Ismailiyya School:** Of all the minor Shia sects, the most important is that of the Ismailis who broke away from the Shias during the 8th century AD (2nd century AH) over the successor to the *Imamat*. They agree with the Ithna-Ashari on the first six Imams, but differ on the seventh Imam. They uphold the claims of Ismail, who was the elder brother of the main Shia Imam, the seventh Imam, Musa al-Kazim Ibn Jafar, and whom the Ithna-Ashari disqualified for drinking wine. The Ismailis introduced into Islam a number of esoteric doctrines, such as the belief in the successive incarnations of God and in the transmigration of souls. They hold that these beliefs are matters of faith and above human discussion. Like the Twelvers, they hold the Imam to be infallible. During the 10th century AD (4th century AH), the Ismaili Fatimid Dynasty established a prosperous empire in Egypt. Today, the Ismailis owe allegiance to the Agha Khan, a descendent of Ismail, and they are now found in Pakistan, Eastern and Southern Africa, and in parts of the Middle East.[33]

(e) Other Schools of Law:

There are other schools of law with very limited following amongst Muslims. These are:

i. The Kharijis

In the war between Ali and Muawiya, Ali's army consisted mainly of irreconcilables and faithful supporters, while Muawiya commanded the best and most disciplined army of the empire. Facing defeat in the Battle of Siffin, Muawiya ordered his troops to raise copies of the Quran on their spears, pleading for arbitration. The majority of Ali's followers opted for acceptance, as the war was for the upholding of the Word of God. A minority refused, believing this to be a military ploy. When Ali, under pressure, agreed to arbitration with his enemy, the defiant troops, the Kharijis (Seceders) left his party to oppose both him and Muawiya, on the grounds that accepting arbitration would imply that the justice of their cause was in doubt, while they fought in the firm belief that it was just. The Kharijis founded a revolutionary party, and their doctrine may be summed up by its two fundamental tenets:[34]

1 The theory of caliphate. The Caliph should be elected freely by all Muslims, regardless of his race, even if he is a slave. There should be as many Caliphs as the countries they rule. The elected ruler should have no right to abdicate or resort to arbitration. Should he err or deviate from the religious precepts, he should be dismissed. The Khariji theory of the state derives from the principle that political power belongs to God and therefore cannot be passed on by any person to his heirs. The Kharijis constitute the Islamic sect most rigorously against monarchy and hereditary rule.

2 The observance of religious imperatives is an integral part of the Islamic faith. Those who believe in God and in the mission of His Prophet (PBUH), but fail to obey the religious injunctions, are deemed to be infidels.

The Kharijis further maintain that ritual purity, which is a precondition for performing religious rites, should be both physical and spiritual. A lie, slander or malice would render one's ablution void, causing one to be ritually unclean. The Kharijis are the only Islamic sect to reject the stoning to death of adulterers, confining the penalty to flogging.

On marriage, they confine the prohibited degrees on grounds of fosterage (suckling a child) to foster-mothers and foster-sisters as decreed in the Quran,[35] and on unlawful conjunction, they allow a man to be married to his wife's maternal or paternal aunt, a relationship

forbidden under all the Sunni schools, but permitted subject to the aunt's consent, according to the Shias.

ii. The Abadis[36]

The majority of historians and writers on Islamic sects and doctrines view the Abadis as a sect of the Kharijis, albeit the most moderate, and the nearest to the Sunnis. Modern European orientalists and Arabists subscribe to this opinion, pointing out that the Abadis are the only surviving Kharijis. This claim, however, is most emphatically denied and even considered a libel by the Abadis themselves, who denounce the Kharijis as dissidents and heretics. True, like the Kharijis, they objected to arbitration in Siffin, but on different grounds. They maintained then that Ali, whom they considered the Legatee of the Prophet (*wasi-ya-nubouwwa*), by accepting the arbitration of men, abdicated the *imamat*, leaving a vacancy for which they elected Abdullah Ibn Wahb Al-Rasi as the new Imam.

They derived their name from Abdullah Ibn Abad At-Tamimi, who died in Basra, in the year AH 85 or 86 (AD 702). Theirs is the reigning doctrine in Oman and they have a considerable following in Tripolitania (the Djabal Nafusa), in Tunisia (the land of Djerbe), in Algeria (the Mzab) and in Zanzibar on the East Coast of Africa.

They believe that the *Imamat* is not an exclusive prerogative of the Prophet's clan, the Quraish, quoting the Quranic ruling:

'Lo! the noblest of you, in the sight of Allah, is the best in conduct.'[37]

What they require of the Imam is justice, piety and strict observance of the edicts of the Quran and the teachings of the Prophet and his first two successors. Therefore, the Abadis do not recognize the *Imamat* of the Umayyad or Abbasid Caliphs, with the only exception of the pious Umayyad Caliph Omar Ibn Abdil Aziz, whose son Abdullah is said by some Abadis to have been an Abadi himself. They acknowledge the multiplicity of the *Imamat* in various countries.

They preach tolerance in war and in peace. Their conduct in victory over their foes is exemplary, observing strictly the edicts of Islam: no looting, no hot pursuit, no torture and no killing of the wounded. Unlike the Kharijis, who deemed all their opponents as infidels, the

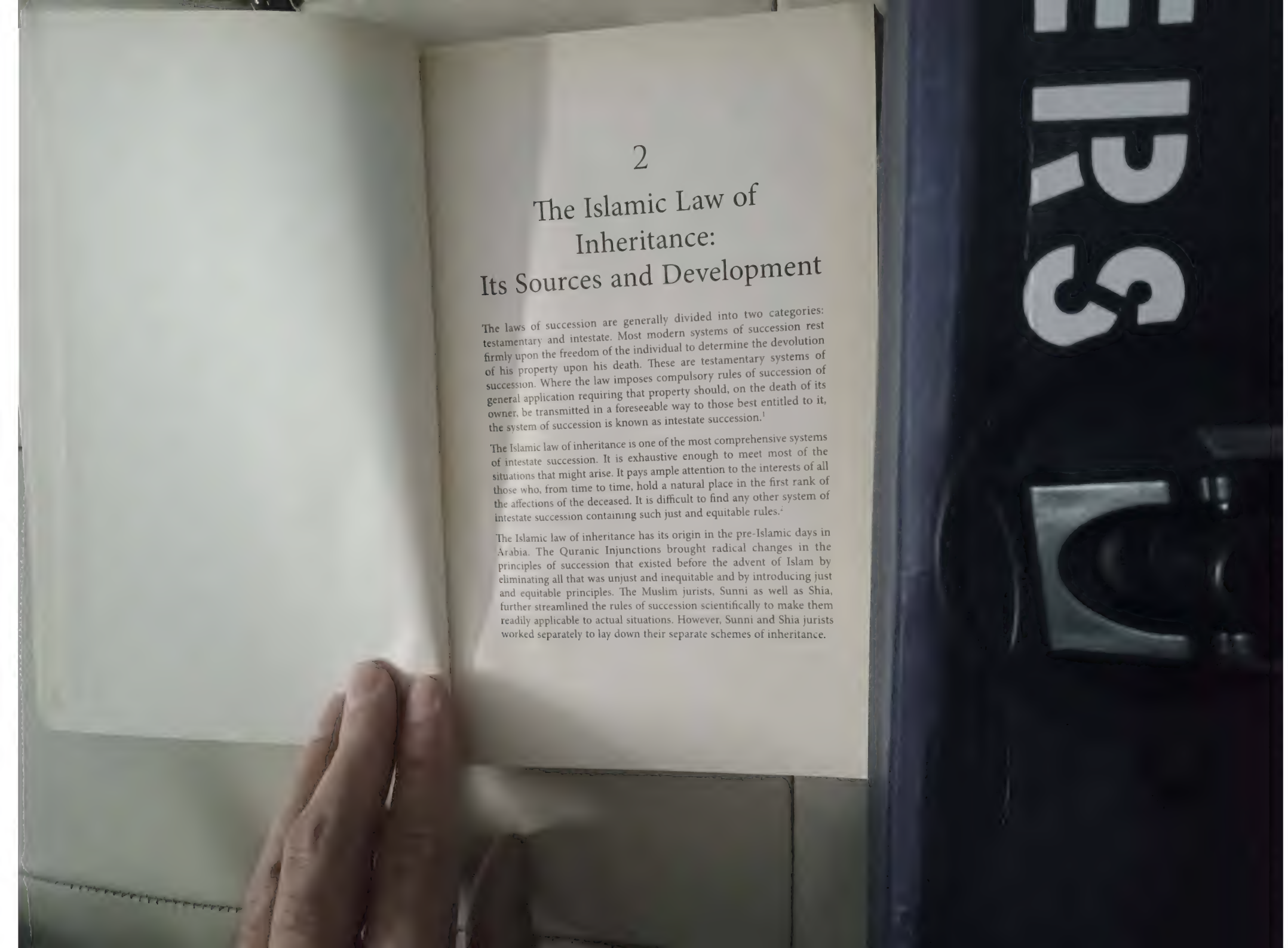
Abadis allow marriage and inheritance between their members and the followers of other Muslim sects.[38]

The Abadis allow a bequest to an heir subject to the consent of the other heirs. They order the mandatory bequest, i.e. a share for orphans in the estate of their grandparents, a reform adopted in the modern laws of Egypt, Syria, Morocco, Tunisia, Jordan, Iraq, Algeria and Kuwait. They prohibit religious endowments, except to mosques.

In general, they differ from the four Sunni doctrines only on comparatively trivial legal issues.

Notes

1. The Quran, *Surah Al Nahl*:16:44.
2. Jamal J. Nasir, *The Islamic Law of Personal Status*, 2nd edn., London: Graham & Trotman. 1990, p. 2
3. Ibid.
4. Ibid., pp. 3-4
5. Ibid., p. 5.
6. The Quran, *Surah Al Ma'idah*:5:49
7. The Quran, *Surah Hashr*:59:7
8. The Quran, *Surah An Nisa*:4:115.
9. The Quran, *Surah An Nisa*:4:105
10. The Quran *Surah Az Zumar*:39:17 and 18
11. The Quran, *Surah Al A'raf*:7:199.
12. Supra, Note 2, p. 20
13. Ibid.
14. Ibid., pp. 20-21
15. Ibid., pp. 21-22
16. Abu Da'ud Sijistani, *Sunan-ul-Mustafa* (also known as Sunanu Abi Da'ud). 1952, Cairo
17. Supra, Note 2, 24
18. The Quran, *Surah Az Zumar*:39:30
19. Supra, Note 2, 7
20. Ibid., p. 8
21. Ibid., pp. 15-16
22. Ibid., pp. 16-17
23. Ibid., p. 17
24. Ibid., pp. 17-18
25. Ibn Hisham: *Siratu Rasul Illah*, 1936, Cairo
26. Supra, Note 2, p. 12
27. Jafri, *The Origin of Shia Islam*, pp. 290-292
28. The Quran, *Surah Al Mumtahanah*:60:10.
29. Supra, Note 2, p. 13
30. Article 'Ithna-Ashari' in Encyclopaedia of Islam
31. The Quran, *Surah At Talaq*:65:2.
32. Supra, Note 2, p. 14
33. Ibid., p. 15
34. Ibid., pp. 8-9
35. The Quran, *Surah An Nisa*:4:23
36. Spelt normally by modern European Scholars as 'Ibadis. Cf. T. Lewicki, Art. al-Ibadiyya, in Encyclopaedia of Islam.
37. The Quran *Surah Al Hujurat* 49:13
38. Supra, Note 2, pp. 9-10.



2

The Islamic Law of Inheritance: Its Sources and Development

The laws of succession are generally divided into two categories: testamentary and intestate. Most modern systems of succession rest firmly upon the freedom of the individual to determine the devolution of his property upon his death. These are testamentary systems of succession. Where the law imposes compulsory rules of succession of general application requiring that property should, on the death of its owner, be transmitted in a foreseeable way to those best entitled to it, the system of succession is known as intestate succession.[1]

The Islamic law of inheritance is one of the most comprehensive systems of intestate succession. It is exhaustive enough to meet most of the situations that might arise. It pays ample attention to the interests of all those who, from time to time, hold a natural place in the first rank of the affections of the deceased. It is difficult to find any other system of intestate succession containing such just and equitable rules.[2]

The Islamic law of inheritance has its origin in the pre-Islamic days in Arabia. The Quranic Injunctions brought radical changes in the principles of succession that existed before the advent of Islam by eliminating all that was unjust and inequitable and by introducing just and equitable principles. The Muslim jurists, Sunni as well as Shia, further streamlined the rules of succession scientifically to make them readily applicable to actual situations. However, Sunni and Shia jurists worked separately to lay down their separate schemes of inheritance.

1. The Pre-Islamic Rules of Inheritance

It would, therefore, be proper and relevant to briefly examine the pre-Islamic law of inheritance in Arabia which was later reformed by the Islamic law. The main ideas of the pre-Islamic law of inheritance were as follows:

1. That individual members of the family formed the wealth and strength of the united family.
2. That the females could neither inherit nor dispose of property.
3. That females were themselves property to be bought and sold in marriage, to be assigned in payment of debt and to be owned and inherited by their males.

Thus, the laws of Arabia in pre-Islamic days were patriarchal despotism unqualified. However, there was no distinction between ancestral and self-acquired property and sons acquired a vested interest at birth in their father's property. In these circumstances, the following rules of succession were commonly applicable:

1 Females and cognates were excluded from inheritance. In certain cases, women constituted part of the estate. A stepson or brother took possession of a dead man's widow or widows along with his goods and chattels.[3] The Quran forbade this custom: 'O ye who believe! It is not lawful for you forcibly to inherit the women (of your deceased kinsmen)'.[4]

Similarly, male minors who were unable to carry arms were deprived of any share in the estate. The tradition has it that some people disputed as much the Prophet's ruling to give a girl half of the estate of her father while she did not ride a horse or fight against the enemy as his ruling to give a boy a share of the inheritance while he was of no avail in wars.[5]

2 The nearest adult male agnate or agnates succeeded to the entire estate of the deceased. Male agnates, who were equally distant to the propositus, shared together the estate per capita.[6]

3 Descendants were preferred to ascendants, who in turn, were preferred to collaterals.

4 The adopted son, even if his real father was unknown, had the same right to the estate as the real son if he was able to carry arms.

5 Mutual inheritance between two men was recognized through a contract of alliance. The famous formula was for one of them to say to the other: 'My blood is your blood, my destruction is your destruction, you inherit me and I inherit you, you pursue my blood feud and I pursue yours'.[7]

The Islamic law of inheritance did not entirely abolish the customary pre-Islamic law, but rather, introduced radical changes into it. The doctrine of shares becomes understandable once it is realised that the sharers consist of those who were not entitled to succeed under the customary law, in the circumstances in which they are granted the right to take their respective shares. According to Tayyabji, the spirit of the Islamic innovations can be expressed in the formula: 'Unto her that hath not and unto the relations of her shall be given, and from him that hath, shall be taken a little (or may be the whole) of what he seemeth to retain'.[8]

2. The Legal Sources of the Law of Inheritance

(a) The Quranic Verses:

On migration of the Prophet and his Companions to Medina, fraternization between the *Muhajireen* (migrants from Mecca) and the *Ansar* (the citizens of Medina) entitled each to inherit from the other. This provision was abrogated after the conquest of Mecca under the two Quranic verses:

> 'And those who afterwards believed and left their homes and strove along with you, they are of you; and those who are akin are nearer one to another in the ordinance of Allah. Lo! Allah is Knower of all things'.[9]

and

> And the owners of kinship are closer one to another in the ordinance of Allah than (other) believers and the fugitives (who fled from Makkah)'.[10]

Earlier, bonds of brotherhood were temporarily approved to establish the right of inheritance, under the Quranic ruling: 'And unto each We have appointed heirs of that which parents and near kindred leave; and

as for those with whom your right hands have made a covenant, give them their due.[11]

Later, inheritance through adoption was abrogated, as an inevitable consequence of the abolition of the whole institution of adoption, under the Quranic verses

'Nor hath he made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But Allah saveth the truth and He showeth the way. Proclaim them (by) parentage. That will be more equitable in the sight of Allah. And if ye know not their fathers, then (they are) your brethren in the faith and your friends.[12]

The right of inheritance for the kindred was first established through the will in the following Quranic verses:

'It is prescribed for you, when death approacheth one of you, if he leave wealth, that he bequeath unto parents and near relatives in kindness. (This is) a duty for all those who ward off (evil). And whoso changeth (the will) after he hath heard it the sin thereof is only upon those who change it.[13]

This ruling was the first parting from the customary law which denied women and children the right to inherit, as parents include both father and mother and near relatives comprise both children and adults.

The stage was now set for the final phase of legislation on inheritance. The principle covering females and males is laid down in the famous verses of *Surah An Nisa*. In verse 7, it is given:

'Unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much - a legal determinate share.[14]

Four verses later, the detailed distribution of the shares is given:

'Allah chargeth you concerning (the provision for) your children: to the male the equivalent of two females, and if there be women more than two, then theirs is two thirds of the inheritance, and if there be one (only) then the half. And to his parents a sixth share of the inheritance to each if he have a son; and if he have no son and his parents are his heirs, then to his mother appertaineth the third, and if he have brethren, then to his mother appertaineth the sixth, after any legacy he may have bequeathed, or debt (that) hath been paid. Your parents or your children: Ye know not which of them is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is Knower, Wise.

'And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a child then the eighth of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid). And if a man or a woman have a distant heir (having neither parent nor child), and he (or she) have a brother or a sister (only on the mother's side) then to each of them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid. A commandment from Allah. Allah is knower, Indulgent.'[14]

At the end of the same *Surah*, there is a provision for the collaterals:

'They ask thee for a pronouncement. Say: Allah hath pronounced for you concerning distant kindred. If a man die childless and he have a sister, hers is half the heritage, and he would have inherited from her had she died childless. And if there be two sisters, then theirs are two-thirds of the heritage, and if they be brethren, men and women, unto the male is the equivalent of the share of two females.'[15]

In order to make these provisions imperative and enforceable, God promises divine reward for abiding by them and prescribes divine punishment for disregarding them in the following words of the Quran:

'These are the limits (imposed by) Allah. Whoso obeyeth Allah and His messenger, He will make him enter Gardens underneath which rivers flow, where such will dwell forever. That will be the great success.

'And whoso disobeyeth Allah and His messenger and transgresseth His limits, He will make him enter Fire, where such will dwell forever; his will be a shameful doom.'[16]

(b) The Traditions of the Prophet (PBUH):

This deals with details of particular cases as resolved by the Prophet in the light of Quranic Injunctions. The main rules laid down or deduced from the Traditions (*Sunnah*) of the Prophet in this connection are as under:

1. The Quran says 'after (the payment of) any legacy he (the deceased) may have bequeathed or debt'. In a tradition narrated by Caliph Ali, the Prophet rules that debts should be paid before any legacy is considered, and that uterine kindred should have prior right to inherit over the consanguine.

2. 'No Muslim shall inherit from a non-Muslim'. More generally, 'No inheritance between two people of different religions'. The Shias differ, allowing a Muslim to inherit from a non-Muslim.[18]

3. 'No murderer shall inherit from his victim'.

4. 'Once a newly-born cries, it shall have the right to inherit'.

5. Zaid bin Thabet narrated that the Prophet ruled that of an estate left by a woman survived by a husband and a full sister, the husband should be given half.

6. A grandmother shall get one sixth of the estate if there is no mother.

7. 'The maternal uncle inherits from him who leaves no other heir'.

8. 'The offspring of fornication with a free woman or slave is deemed illegitimate and shall not inherit nor shall be inherited from'.

9. 'The son of imprecation (lian) shall be inherited from by his mother and her heirs thereafter'.

(c) The Consensus of the Prophet's Companions:

This has been adopted in respect of the entitlement of the agnate grandfather in the absence of the father, the share of the son's daughter how-low-soever, of the son's son, how-low-soever and of the consanguine sister.[19]

(d) The Reasoned Opinion of the Early Jurists:

This has been observed in matters of the inheritance of the cognates, proportionate abatement (*awl*), return (*radd*), and on some questions of exclusion from inheritance (*hajb*).[20]

3. The Islamic Reforms

Although the laws containing inheritance are definite and detailed as laid down in the Quran, but still in order to elaborate them and to present them scientifically, the jurists of Islam have acted with wisdom and careful thought. Further, it can be noticed that Islam brought about considerable reforms in the law of inheritance as it existed in Arabia during the pre-Islamic days. These reforms were twofold; first, they made the female a co-heir with the male, and secondly, they divided the property of the deceased among his heirs on a democratic basis, instead of handing his entire estate over to the eldest son, as was done by the law of primogeniture. The Arabs had a very strong tradition that only those who could use the spear and the sword were entitled to inherit, and therefore, no portion of inheritance was given to such heirs who were not capable of meeting the enemy and fighting in battles. Owing to this tradition, which strongly appealed to a people among whom tribal fighting was a daily matter, not only were all females (i.e., daughters, widows and mothers) excluded, but even male minors had no right to inherit.[21] Women, in fact, were looked upon as part of the property of the deceased and, therefore, their right to property by inheritance was considered out of the question. Even under the Jewish law, women did not have a better position. Islam came as the defender of the weaker sex and the orphans, and just when a defensive war against the whole of Arabia was being carried on by a handful of Muslims, the prevailing law of inheritance, which gave all the property of a deceased person to those members of the family who bore arms, was declared as unjust, and a new law was introduced, putting widows and orphans on a level of equality with those who fought for the defense of the community and the country.[22]

Before closing this Chapter, a few general remarks on the law of succession would be appropriate, and are given below:

1. No privileges whatsoever are given to the first born in the matter of inheritance. The Islamic law of inheritance differs on this point from the Old Testament with which on so many other matters it is in entire agreement.[23]

2. In most cases, the share of a female is equal to one-half of the share of a male. This was a vast improvement upon the customs

all pre-Islamic times when women had no right to own property.

3. According to the law of inheritance, the child of a lawful wife and that of a concubine had exactly the same right to inherit the father's property, provided always that the child of the concubine was acknowledged by her master.[11]

4. An illegitimate child inherits only from its mother and her relatives and vice versa.[12] A child of a concubine, if acknowledged by her master, was not regarded as illegitimate. Where there is no legal heir or legatee, the property escheats (reverts) to the government treasury.

4. The Debts of the Deceased

It is clear from the reading of the verses of the Holy Quran which lay down the law of inheritance, that succession to the heirs can open only after all the debts of the deceased are paid and his bequests are dismissed. A Muslim is not allowed to make a bequest of his property in favour of one or more of his heirs unless all the heirs at the time of his death consent to it. In the case of someone who is not an heir, a valid bequest can be made up to one-third of the total property of the deceased available at the time of his death. Any bequest in excess of one-third of the property is invalid to the extent of the excess until or unless the heirs of the deceased consent to such excess after the death of the deceased and before the opening of the succession. One-third of the property is calculated for the purpose of bequests after all the debts of the deceased have been paid. The law regarding bequests has been dealt with in detail in a subsequent chapter in this book.

Debts are the first charge on the property of the deceased. The expenses relating to burial are also regarded as a debt, which must be paid out of the property of the deceased. The wife's dower, if unpaid, is also a debt and must be paid out of the property before it is divided. The jurists divide debts into three categories:

a those contracted in health;

b those contracted during illness resulting in death, and

c those contracted partly in health and partly in illness.

The debts as given in (b) come last in the debts of the deceased and are chargeable only after the debts given in (a) and (c) are satisfied. All wages due to servants are also included in debts.

Therefore, after the valid bequests of the deceased have been complied with and all his debts are settled, the remainder of his property and assets can be divided among his heirs according to the rules of succession as given by Islam.

5. The Rules Regarding Different kinds of Debts

Different debts contracted by the deceased during his lifetime are discussed below:

(a) Debts Equal to or Exceeding Assets of the Estate

In this case, the assets are distributed among the creditors in proportion to their claims. Consequently, the creditors have the right to nullify any transaction such as sales, purchases or gifts, which were concluded by the deceased during the illness that caused his death,[26] if such transactions affect the value of the debts.

The executor and/or guardian appointed by the deceased before his death, or by the judge, if the deceased had failed to nominate an executor or guardian, disposes of the estate in order to repay the debts and deal with the creditors.

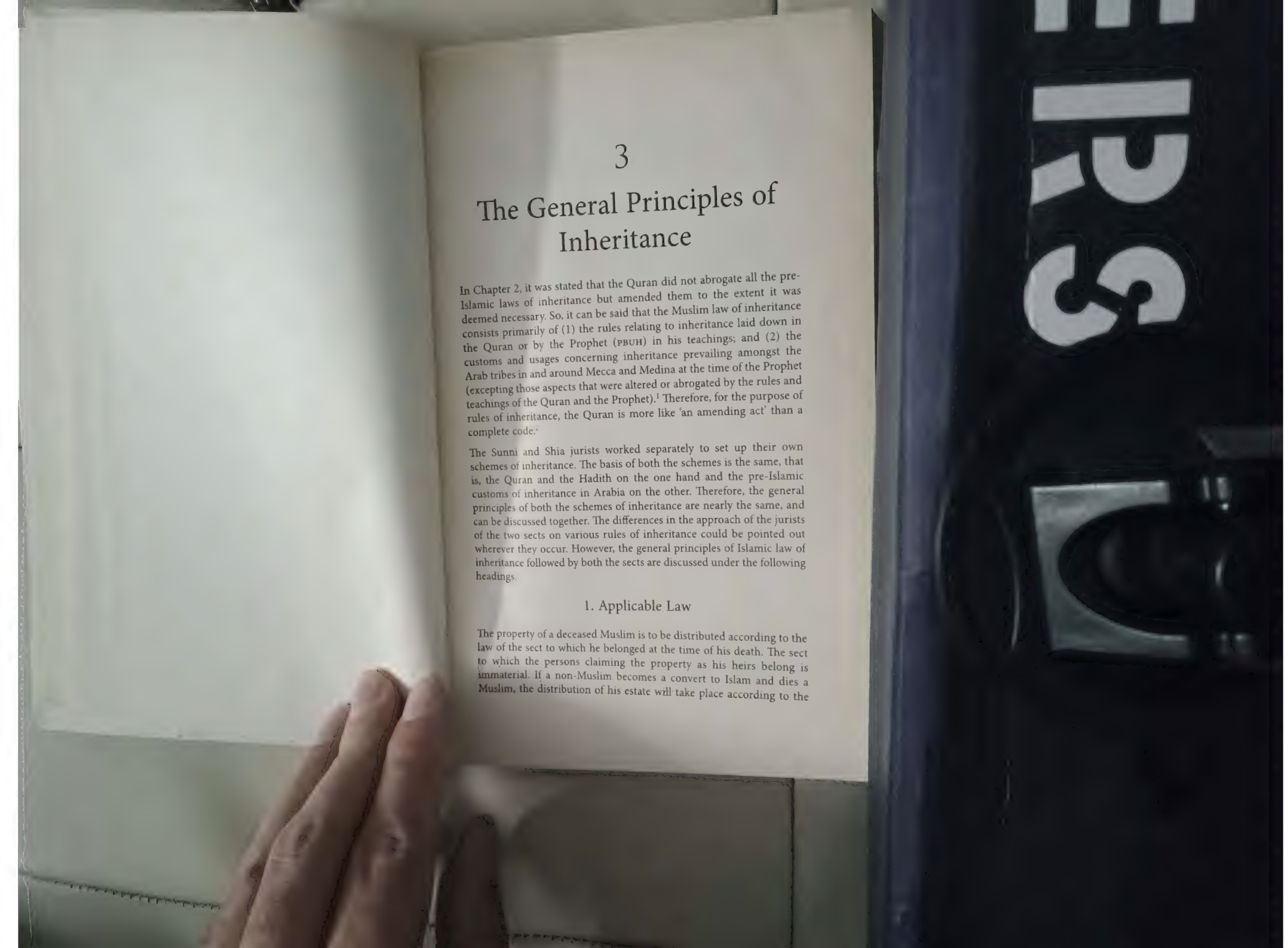
The executor and/or guardian discharges the debts of the estate with funds derived from claims recovered, cash in hand, proceeds of the sale of movables, and, if the funds so obtained are insufficient, with the proceeds of the sale of immovable property of the estate.

(b) Assets of Estate Exceeding Debts

If the estate exceeds the value of the debts, the executor nominated by the deceased also acts as a guardian and agent of such heirs as are minors or absent. He repays the debts if it is possible to do so from the assets alone, or else sells a sufficient part of the estate to repay the debts, even if there are majors among the heirs. He can sell any real property apart from what is absolutely necessary to repay the debts on the estate, if it is in the interest of the heirs whose guardian and agent he is.

Notes

1. N.J. Coulson, *Succession in the Muslim Family*, Cambridge, Cambridge University Press, 1971, p. 1.
2. W.H. Macnaghten, *Principles & Precedents of Mohammadan Law*, V, 1870.
3. Al-Ghendour, *Inheritance under Islam and the Law*, p. 3.
4. The Quran, *Surah An Nisa*:4:19.
5. Supra, Note 3, p. 5.
6. Ibid., p. 3.
7. Madkoor, *Succession under the Islamic Jurisprudence*, p. 16.
8. F.B. Tayyabji, *Muhammadan Law*, pp. 826-27, 1940.
9. The Quran, *Surah Al Anfal*:8:75.
10. The Quran, *Surah Al Ahzab*:33:6.
11. The Quran, *Surah An Nisa*:4:33.
12. The Quran, *Surah Al Ahzab*:33:4 and 5.
13. The Quran, *Surah Al Baqarah*:2:180-181.
14. The Quran, *Surah An Nisa*:4:11-12.
15. The Quran, *Surah An Nisa*:4:176.
16. The Quran, *Surah An Nisa*:4:13 and 14.
17. Jamal J. Nasir, *The Islamic law of Personal Status*, 2nd edn., London: Graham & Trotman, 1990, p. 223.
18. Al-Hille, *Jaafari Provisions in Personal Status*, 1947, p. 145.
19. Supra, Note 17, pp. 223-224.
20. Ibid., p. 224.
21. M.M. Ali, *The Religion of Islam*, 2nd edn., 1950, p. 701.
22. Ibid., p. 702.
23. R. Roberts, *The Social Laws of Quran*, 1907, p. 66.
24. Ibid., p. 67.
25. A. Rumsey, *Al-Sirrajiyyah*, London: Premier Book House, 1959, pp. 1-2.
26. Death-illness (*marad-ul-maut*) is one where it is highly probable will end in death. Art. 1595 of the *Mejelle*, which codifies the Hanafi Jurisprudence gives the following definition: 'Death-illness is one where there is preponderance of apprehension of death, and which renders the patient incapable of attending to ordinary avocations, out-of-doors for the male and in-doors for the female. The patient would die in this state of affairs within a year. Should the illness linger on for a year, unchanged, the patient shall be deemed like a healthy person unless his condition gets worse and death follows before the lapse of one year, in which case the condition from the time of worsening to death shall be deemed a death-illness.'
27. Supra, Note 17, pp. 287-288.



3

The General Principles of Inheritance

In Chapter 2, it was stated that the Quran did not abrogate all the pre-Islamic laws of inheritance but amended them to the extent it was deemed necessary. So, it can be said that the Muslim law of inheritance consists primarily of (1) the rules relating to inheritance laid down in the Quran or by the Prophet (PBUH) in his teachings; and (2) the customs and usages concerning inheritance prevailing amongst the Arab tribes in and around Mecca and Medina at the time of the Prophet (excepting those aspects that were altered or abrogated by the rules and teachings of the Quran and the Prophet).[1] Therefore, for the purpose of rules of inheritance, the Quran is more like 'an amending act' than a complete code.[2]

The Sunni and Shia jurists worked separately to set up their own schemes of inheritance. The basis of both the schemes is the same, that is, the Quran and the Hadith on the one hand and the pre-Islamic customs of inheritance in Arabia on the other. Therefore, the general principles of both the schemes of inheritance are nearly the same, and can be discussed together. The differences in the approach of the jurists of the two sects on various rules of inheritance could be pointed out wherever they occur. However, the general principles of Islamic law of inheritance followed by both the sects are discussed under the following headings.

1. Applicable Law

The property of a deceased Muslim is to be distributed according to the law of the sect to which he belonged at the time of his death. The sect to which the persons claiming the property as his heirs belong is immaterial. If a non-Muslim becomes a convert to Islam and dies a Muslim, the distribution of his estate will take place according to the

Muslim law of the sect to which he became a convert.[1] In determining the laws or laws of a deceased who had renounced the Hindu religion and embraced the Shia faith, recourse must be had to the Shia law of inheritance.[2]

2. Heritable Property

It is a general principle that all property, moveable or immoveable, that a Muslim leaves behind after payment of funeral charges, debts and legacies, if any, is subject to devolution among his heir or heirs.[5] There is no distinction between moveable and immoveable property, or between ancestral and self acquired property.[6] Sunni law treats this principle strictly.[7] Shia law, however, while adhering to the principle in general, recognizes certain exceptions.

(i) while a widow who is not childless, inherits a share of her husband's land, a childless widow is not entitled under Shia law to a share in the land belonging to her husband.[8] 'Land' does not include the buildings or trees standing on it. A childless widow is entitled to a share in the value of such buildings and trees, and any sum payable by way of rent charges. She, however, is entitled to a share in the moveable property of her husband. The term 'land' is not confined to agricultural land only but also includes the site for buildings. But the question arises whether a widow, who has no child at the time of her husband's death but had borne a child who was dead, is disqualified from inheriting the land. There is difference of opinion on this question. According to Baillie's *A Digest of Mohammadan Law*, such a widow would be entitled to inherit, but Ameer Ali has stated a contrary view. The latter view has been upheld in India.[9] However, a childless widow under the Shia law is entitled to a share in the proceeds of the sale of a building belonging to her deceased husband though she herself has no power of selling ownership of the building to anyone.[10] As stated above, inheritance to the estate of the deceased is governed by the law of the sect to which he belonged at the time of his death. Thus, a childless Sunni wife of a Shia husband cannot inherit land.

(ii) The eldest son, if he is of sound mind, is entitled to succeed exclusively to the wearing apparel of the father, and to his Quran, sword and ring, provided the deceased has left property besides those articles.[11]

3. Birthright

Islamic law does not recognise the birthright to inherit. The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor.[12] The heir-apparent's right to succeed is nothing more than a mere *spes successionis*, that is, a mere chance to succeed, which may be defeated in a number of ways, for instance, a transfer by the owner of his entire estate before his death.[13] An heir apparent cannot make a claim on the property of his living ancestor. A person is entitled to dispose of his property the way he pleases, that is, by sale, mortgage or gift etc., and an heir apparent cannot challenge an inter *vivos* transfer. An heir apparent has no control over his ancestor's actions and has no standing to challenge any transaction made by him (the ancestor) during his lifetime.

From the above discussion, it is clear that the chance of a Muslim heir-apparent to succeed to an estate cannot be the subject of a valid gratuitous (transfer or release).[14] But, here arises another question; that is, whether the transfer, release or renunciation of *spes successionis* made for consideration is valid? There is conflict of opinion on this point. It is generally held that a transfer, release or renunciation by an heir apparent of his chance to succeed is invalid and does not estop him from inheriting after the death of the owner. The rationale is that, as *spes successionis* does not exist as a right according to Islamic law, therefore, any transfer, release or renunciation of *spes successionis* is the transfer, release or renunciation of something non-existent and is thus invalid. Therefore, the heir is not bound by such transfer or release but must return the consideration.[15] Such relinquishment cannot be relied upon as an estoppel under the Islamic law against the heir apparent so as to preclude him from rejecting the transaction by which he was benefited.[16] On the other hand, it has been held that while the relinquishment of a right of succession is not valid under Muslim law, there is nothing illegal about a person contracting not to claim the estate

for good consideration.[17] If the relinquishment is merely a contract ... ing a contingent right of inheritance when succession ... future, then if such a contract is made for a consideration, it is ... illegal.[18] Where the consideration received is only a cash considera... and the contract is subsequently sought to be enforced, the Court ... refuse specific performance and make the heir pay compensation ... the breach of contract. But in a case where the agreement was made ... a form which makes it impossible for the Court to grant adequate ... compensation to the aggrieved party, the agreement might well be ... enforced and the heir be held bound by it. It was further held that ... heir might by his conduct be estopped from claiming the inheritance ... he had agreed to relinquish if the release was part of a compromise or ... family settlement and if he had benefited from the transaction.[19] But this view of the Allahabad High Court was expressly rejected by the Madras and Kerala High Courts on the ground that such a view was not justified in Islamic law.[20] If an heir apparent fraudulently or erroneously represents himself as authorised to transfer immoveable property belonging to his praepositus to be, and transfers such property for a consideration, such transfer is likely to operate against his interest after the opening of succession under section 43 of the Transfer of Property Act (IV of 1882).

However, a relinquishment of inheritance may, of course, be made after succession opens. Islamic law allows relinquishment of the right of inheritance by an adult heir of sound mind after the death of the owner.

4. Vested Inheritance

A 'vested inheritance' is the share which vests in an heir at the moment of the ancestor's death.[21] This right is not lost by the death of any heir before the actual distribution of the property[22] and passes to his own heirs at the time of the death.[23] Vested inheritance is not to be confused with *spes successionis*, which is the character during the lifetime of the ancestor. From the moment of the death of the praepositus, the property devolves on his heirs in specific shares and the heirs acquire vested interest in it. There is no abeyance of the property under Islamic law.

5. Primogeniture

Primogeniture is the rule by which the eldest son succeeds to the entire property of his father to the exclusion of other sons and daughters. This is the absolute rule of primogeniture but a partial rule of primogeniture has also been applied in certain legal systems at various points in time. Under the partial rule of primogeniture, the eldest son does not inherit the entire property of his father but gets some advantage over his brothers and sisters. Islamic law does not recognize the rule of primogeniture.[24] There is one minor exception to this. The Shia law and the Shafii and Maliki Schools of Sunni law do recognize the exclusive right of the eldest son to certain articles of the father, such as his wearing apparel, Quran, ring and sword, provided the eldest son is of sound mind and the deceased has left property other than these articles.[25]

6. Separate Devolution on Heirs

The estate of a deceased Muslim devolves on each of his heirs separately and the heirs are entitled to hold property as tenants-in-common, each having a separate share in the whole property.[26] The property of a deceased Muslim devolves on his heirs in specific shares with the interest of each heir being separate and distinct. Similarly, each heir is liable for the debts of the deceased proportionate to his share of the estate.[27] A joint family under the Islamic law implies only a group of individuals living and messing together. It is not a legal entity. The principle of survivorship is not known to Muslim law. The heirs of the deceased take their shares as if they were tenants-in-common and not joint tenants with rights of survivorship. Their position is simply of separate co-sharers.

7. The Principle of Representation

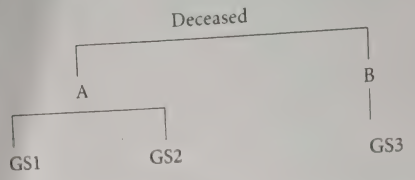
Islamic law does not recognise the principle of representation. For example, if a Muslim had two sons and one of them died during his lifetime leaving behind several children, those children cannot represent their father on the death of their grandfather so as to inherit their father's share. This non-recognition of the principle of representation is due to the cardinal principle of Islamic law of inheritance which is that

the nearer in degree of relationship to the deceased excludes the more remote. So, the entire property of a deceased Muslim devolves on his heirs at the time of his death. This rigidity of the Islamic law of inheritance against the doctrine of representation has been strongly criticised by modern writers and legislators in different Muslim countries. It can be considered as one of the most serious problems in the realm of Islamic law of inheritance, and lately, certain Muslim countries have attempted different solutions of their own to solve this problem. In a later chapter of this book, the problem is discussed in detail, with different solutions offered by different Muslim countries and their implications.

However, the principle of representation has more than one meaning and may be applied either for the purpose of deciding as to who are entitled to inherit, or determining the quantum of the shares of the heirs.

It has been discussed above that for the purpose of determining the persons entitled to inherit, the doctrine of representation is not recognized under the Islamic law. However, for the purpose of determining the share an heir is entitled to receive, Sunni and Shia laws of inheritance differ radically. For the limited purpose of calculating the share of each heir, the Shia law accepts the principle of representation as a cardinal principle throughout.[28] According to that principle, the descendants of a deceased son, if they are heirs, take the portion which he, if living, would have taken and in that sense they represent the deceased son.[29] In the same limited sense, the descendants of a deceased daughter represent the daughter, and similarly, the principle is applicable to the descendants of deceased brothers, sisters, uncles or aunts, etc. Shia jurisprudence looks upon children, parents, brothers and sisters as the principal heirs, or 'roots' of the system of inheritance. Other relatives are subsidiary heirs or 'branches', and their derivate rights are determined by the standard applied to the root or principal heir through whom they trace their connection with the praepositus. In sum, therefore, where there are a number of competing subsidiary heirs who are connected with the praepositus through different principal heirs, each 'root' transmits to its own 'branch' the share of inheritance that it would notionally receive in competition with the other 'roots' represented. This share, as a general rule, is then distributed among the 'branch' as if the 'root' itself were the praepositus.[30]

The Sunni law does not recognize the principle of representation even in this limited sense. The heirs are allocated shares regardless of the intervening deceased heirs. An example can make the distinction between the Shia and Sunni Schools clear. Suppose that a deceased Muslim leaves behind two grandsons GS1 and GS2 by a predeceased son A and a grandson GS3 by another predeceased son B, as shown in the diagram below, the distribution of the estate would take place as under:



Under the Shia law, the estate is divided first among the two predeceased sons A and B, so that each take 1/2, A's 1/2 share descends to his two sons GS1 and GS2, each taking 1/4, B's 1/2 share passes on to his son GS3. This is also called distribution per stirpes. But under the Sunni law, the distribution would be 'per capita' which means that all three grandsons would each take 1/3 without reference to the shares which their respective fathers, if living, would have taken.

The principle of representation, under the Shia law, is not confined in its operation to descendants only. It applies to the ascendants as well. Thus, great grandparents take the portion which the grandparents, if living, would have taken, and the father's uncle and aunts take the portion which the deceased's uncles and aunts, if living, would have taken.

8. The Allocation of Shares between Males and Females

According to Islamic law of inheritance, a male takes double the portion of a female in the same degree of relationship from the deceased. The rule applies to lineal descendants and all relatives on the paternal side. The only exception is the relatives connected through the mother only, like uterine brothers and sisters, when inheriting from each other, take equally, regardless of sex. However, a female inherits half of what a male inherits in the same degree of relationship from the deceased, still she

absolute owner of the portion of property that she inherits. There is no restriction or disabilities imposed upon her right of ownership, enjoyment and administration of the property that she inherits.

9. The Rule of Propinquity

In determining the preferential claims of the heirs, the Shias adopt the rule of propinquity and ignore those of agnation, that is, they prefer the nearer kinsmen to those more remote. The distinction of agnates and cognates is fully recognized by the Sunnis, who have distinctly termed the cognates as 'Distant Kindred'.[9] The rule that the nearer in degree excludes the more remote is applied to the kindred of the same class only. The rule of propinquity may apply between the members of a class, but it does not apply as between classes. Where, therefore, a person is a residuary of the propositus, he does not lose his rights as such a residuary merely because he also had a relationship with the propositus through another person.[10] This theory of propinquity or nearness in blood is fully recognized by the Shias but partially by the Sunnis.[11] This distinction is emphasised in the later chapters.

10. Presumption in Favour of a Muslim Child

When either of the parents is a Muslim, Islamic law presumes the child to be a Muslim[12] (until it is able to make a choice, in other words, when it attains majority), and the right to its succession is regulated by the laws of Islam, and of the school or sect to which the parent conforms.[13]

Notes

1. F.B. Tayyabji, *Muhammadan Law*, 4th edn., Bombay: N.M. Tripathi Private Ltd., 1968, p. 800.
2. A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd edn., London: Oxford University Press, 1964, p. 381.
3. M.D. Manek, *Handbook of Mohammadan Law*, 3rd edn., 1961, p. 160.
4. Mitar Sen Singh v Maqbul Husain, AIR 1928 Oudh 138(DB).
5. Yudhisthira, *A Textbook of Muhamedan Law*, 6th edn., Allahbad: R.N. Lal, 1957, p. 516.
6. D.F. Mulla, *Principles of Mahomedan Law*. 16th Edn., Bombay: N.M. Tripathi, 1968, p. 44. Also Yusuf Abbas v Mst Ismat Mustafa, PLD 1968 Karachi 480.
7. B.R. Verma, *Muhammadan Law in India and Pakistan*, 4th edn., Bombay: N.M. Tripathi, 1968, p. 341.
8. Umerderez Ali v Willayat Ali, 19 Allahabad 169 (1897); Mir Ali v Sajida Begum, 21 Madras 27 (1898); Murdin v Asha Bi, 20 Indian Cases 660 (1913); Daulat Khatun v Amina Bibi, PLD 1958 W.P. (Rev) 67; Syed Muhammad Munir v Abu Nasar, PLD 1972 Supreme Court 346.
9. Muzaffir Ali Khan v Parbati, 29 Allahabad 640 (1907); Parbati v Muzaffir Ali Khan, 34 Allahabad 289 (1912); Ali Zamin v Syed Muhammad Akbar Ali Khan, AIR 1928 Patna 441, 20 Indian Cases 660.
10. Shaukat Ali v Anwar-ul-Haq, AIR 1920 Lahore 57; Durga Das v Muhammad Nawab Ali Khan, AIR 1926 Allahabad 522.
11. Supra, Note 6, p. 120.
12. Faqir Ullah v Mir Khan, PLD 1958 Azad Jammu & Kashmir 19; Daulat Khatoon v Member, Finance, Land Revenue, PLD 1975 Lahore 59.
13. Supra, Note 7, p. 343.
14. Supra, Note 6, p. 45.
15. Samsuddin v Abdul Husein, 31 Bombay 165, (1907); Kochunni Kochu Muhammad v Kaniu Pillai Muhammad, AIR 1956 Trav Co 217.
16. Hasan Ali v Nazo, 11 Allahabad 456 (1889).
17. Muhammad Hashmat Ali v Kaniz Fatima, 27 I.C. 701 (1915); Ghulam Abbas v Haji Kayyam, Ali, AIR 1973 S.C. 554.
18. Latafat Hussain v Hidayot Hussain, 1936, Allababad 573; Kochunni Kochu Muhammad V. Kaniu Pillai Muhammad, AIR 1956 Trav Co 217.
19. Latafat Hussain v Hidayot Hussain, 1936, Allababad 573.
20. Abdul Kafoor v Abdul Razack, AIR 1959 Madras 131: Kunhi Avulla v Kunhi Avullah, AIR 1964 Karala 200.
21. Faqirullah v Mir Khan, PLD 1958 Azad Jammu & Kashmir 19.
22. Supra, Note 7, p. 347.
23. Supra, Note 5, p. 518.
24. Supra, Note 3, p. 161.
25. Supra, Note 7, p. 342.

... Pappthiammal, AIR 1919 Madras 172;
... Mehdi Ali Khan, AIR 1956 Hyderabad 18(FB);
... Mohideen, AIR 1970 Madras 200; Syed Shah
... Syed Ahmad Shah, AIR 1971 S.C. 2184.
... Muhammad Mahmood Hassan, AIR 1957 Patna
...
...
... *Muslim Family*, London: Cambridge
... 1971, p. 111.
... Muslim Law, 9th edn., 1965, p. 882.
... AIR 1927 Calcutta 808 (DB).
... Supra, Note 51, p. 882.
... V. Deoshish, AIR 1971 Oudh 301.
... Law Vol. II 6th edn., 1965, p. 19.

4

The Rules of Exclusion From Inheritance

In addition to the general principles of the law of inheritance enumerated in the previous chapter, there are also certain general rules of exclusion from inheritance. Exclusion from the inheritance can be of two kinds; partial or total.

1. Partial Exclusion

Partial exclusion is, in reality, a reduction of the share receivable by one heir because of the existence of another heir.[1] There are six persons who are not subject to total exclusion; the father, the son, the mother, the daughter, the husband and the wife.[2] As regards all others, the nearer in degree excludes the more remote; this is always true of residuary but the nearer residuary does not always exclude a more remote sharer.[3] For example, a mother's mother is not excluded by a father, nor does a nearer Sharer, unless the right of succession is founded on the same relationship, as in the case of a mother and a grandmother, or a daughter and a son's daughter.

Generally, the persons who are related through others do not inherit with them, except in the case of uterine brothers and sisters who can inherit with their mother, although they are connected to the praepositus through their mother.[4] Those who are basically disabled from inheriting, like a murderer of the deceased, a slave or an infidel, cannot exclude others, totally or partially.[5] They are considered to be non-existent for the purpose of the distribution of the estate of the deceased. But sometimes a person, who is excluded himself, may exclude others, partially or totally. For example, two or more brothers or sisters, full or half, of a childless praepositus, are excluded in the presence of the father; but they do affect the share of the mother whose share is reduced from a third to a sixth.

A relative nearer in degree always excludes the more remote, whether he himself is an heir or excluded. Thus, if the heirs are a father, a father's mother and the mother of a mother's mother; the father takes the whole because he excludes his mother, and she in turn excludes the mother of the mother's mother, being nearer in degree of relationship to the deceased.[6] There are different opinions about her right of succession along with her son, that is, the paternal uncle of the deceased.

Other examples of partial or total exclusion due to the co-existence of an heir will be discussed in the forthcoming chapters.

2. Total Exclusion

Under the Islamic law, several causes may debar a person from succeeding to the estate of the praepositus, notwithstanding, that he may stand to the deceased in relation of an inheriting kinsman. These are called the legal causes of exclusion. According to *Al-Sirrajiyyah*, the murderer of the praepositus, a slave or an infidel[7] are the legal subjects of exclusion. The legal causes, which may exclude a person otherwise qualified to inherit as heir, are generally enumerated under the following headings:

a Homicide,
b Illegitimacy,
c Difference of Religion,
d Difference of domicile or allegiance
e Slavery, and
f Estoppel in succession

(a) Homicide:

An heir, who caused the death of a person from whom he is entitled to inherit, is debarred from inheriting from his victim in other systems of law as well, on the principle of public policy. Under the Hanafi law, one who has unlawfully killed the deceased, whether intentionally or unintentionally, has no right to inherit any portion of the deceased's estate.[8] The causing of death must be the direct result of an act of the heir, even if it is by mere negligence or accident. Neil B.E. Baillie in '*A Digest of Mohammadan Law*' gives a few examples of killing, whether

intended or by misadventure, in the following words: by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer is riding.[9] In all these cases, the killer loses his right to inherit any portion of the property of the deceased. However, an indirect cause of a person's death may not be sufficient ground for exclusion from inheritance: as for instance when a person has dug a well into which another falls, or placed a stone in the road against which he stumbles and is killed in consequence.[10] An act of homicide that induces retaliation or expiation is a cause for depriving one of a right of inheritance from the person slain, and an act that does not induce either of the two consequences is merely an indirect cause.[11] There is a difference of opinion as to a father causing death as a consequence of admonition by stirpes. According to Abu Hanifa, he loses his right to inherit but his disciples, Abu Yusuf and Imam Muhammad, hold the opposite view. Another exception to the rule is that the right to inherit would not be lost if the death results from some act done in performance of a legal duty, like a person inflicting punishment under the direction of law.

However, the Shia law differs from the Hanafi law on this point to the extent that under Shia law, the homicide must be intentional and unjustifiable to be a bar in succession.[12] Thus, justifiable and accidental homicide does not operate as bar to inheritance.

The rule of exclusion applies to the murderer and his descendants.[13] In order to prove this exclusion, proof of conviction and sentence for the offence of murder would be sufficient, and it would not be necessary to establish the murder through independent evidence in different proceedings, where this ground of exclusion is being pleaded.[14]

In order to attract the rule of public policy which excludes a murderer and his descendants from succession, it is necessary that the murder should have been committed with the object of getting the murdered man's property.[15] It is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property of his victim, even in respect of property which would have come to the hands of the victim but for his murder.[16] In Pakistan, the matter has been finally settled through legislation. A person committing *Qatl-i-amd* or *Qatl shib-i-amad* is an heir or a beneficiary under a will; he stands debarred from succeeding to the estate of the victim as an heir or a beneficiary.[17] *Qatl-i-amd* is deliberate and intentional homicide and

5

Special Cases in the Law of Inheritance

In addition to the general principles of the law of inheritance and general rules of exclusion from inheritance, the Muslim jurists have painstakingly evolved principles to resolve problems connected with special cases in the law of inheritance. These principles are being discussed separately in this chapter. These problems occur primarily due to the occurrence or expectancy of occurrence of an event, the happening of which raises difficult issues for the law of inheritance. Sometimes, the very status of a certain person can also lead to a problem for resolution under the law of inheritance. These cases are discussed under the following categories:

1. A Child in the Womb,
2. Hermaphrodites,
3. Missing Persons,
4. Captive,
5. Persons killed in a Common Accident,
6. Step-Relations.

1. A Child in the Womb

A child in the womb of the mother at the time of its father's death is entitled to inherit, and a share in the inheritance has to be reserved for him. The presumption of the law is that a child born alive is possessed of the right of inheritance from the time of conception.[1] There is difference of opinion about the period during which such a child must be born after the death of the praepositus. According to one view, the right of inheritance in such a case continues for two years after the death

and he (then) he shall not inherit: but if a greater part of him come out, and then he die, he shall inherit; and if he come out straight (or with his head first) then his breast is considered; I mean, if his whole breast come out, he shall inherit: but if he come out inverted (or his feet first) then his navel is considered."[3]

It is also provided that if the death of the child in the womb was caused by violence to the mother, like striking on the belly, then the dead child would be regarded as one of the heirs. The provision is meant to secure the pregnant widow from violence at the hands of other heirs.

Under the Shia law, the heirs would take the smallest share to which they would be entitled in the event of the birth of the child and the rest would be reserved. The share of two sons should be reserved as a measure of precaution.[4] Thus, if the deceased left one son and a fetus in the womb, only one-third will be given to the existing son and two-thirds will be reserved. The rule is based on the assumption that twin boys or twin sisters would be born. A similar assumption is made in the Shafii and Hanbali law. The assumption in Hanafi law is that one boy or one girl would be born.

According to the Maliki law, distribution of the estate is completely suspended until the birth of the child, or until it is established whether the pregnancy existed or not at the time of the praepositus' death. The other schools, however, hold that this occasions unnecessary prejudice to the rights of other heirs.

2. Hermaphrodites

The hermaphrodite, whose sex is doubtful, gets the smaller of the two shares, which is usually the share of a female.[5] For example, when a man leaves behind a son, a daughter and an hermaphrodite, the hermaphrodite gets the share of a daughter. But Abu Yusuf differed from this view. According to his view, the son has one share, and the daughter has half a share, so the hermaphrodite should have three-fourths of a share, since the hermaphrodite would be entitled to one share, if he was a male and to half a share if he was a female, and this three-fourth of a share is settled by dividing into half the sum of two portions.[6] Imam Muhammad would make the distribution more in line with Abu Yusuf's views. In the above example, Imam Muhammad would divide the estate into forty portions, 18 going to the son, 9 to the daughter and 13 going to the hermaphrodite.

3. Missing Persons

A person is said to be missing when he is absent and there is no definite information if he is alive or dead.[11] Missing persons raise problems for the law of inheritance in two different ways: (a) What should be done with the property of missing persons? (b) What would be the effect on the succession of the estates of predeceased persons when one or more of his heirs are missing persons?

The general rule to both these points is that (a) a missing person is considered alive with respect to his own estate, so that no one may inherit from him, but (b) dead as to the property of others, so that he does not inherit from anyone.[12] But this general rule is not without problems. For example, how long shall a person be considered alive in respect to his own estate? And, when should he be presumed dead in respect of others' property, thus barring his right to inherit. The law of inheritance regarding the status of missing persons has remained in a state of uncertainty for centuries and has still not been fully resolved.

Regarding (a), the oldest view was that he is not to be considered dead so long as there are any of his contemporaries alive. Abu Hanifa fixed that time at one hundred and twenty years from the date of his birth. Imam Muhammad reduced it to one hundred and ten years and Abu Yusuf further reduced it to one hundred and five years. But, according to *Al-Sirrajiyyah*, some of the learned have fixed ninety years as the extreme limit of human existence.[12] This view seems to hold good according to later authorities.[13] The legal position on this point is that the partition of the missing person's property can only be done under a decree of the court declaring the missing person to be dead; otherwise distribution would be permissible only after ninety years from the birth of the missing person. Hanbal differed with this view. According to him, when there is a strong presumption of death, the property should be divided among the heirs. For example, if a man is missing from the ranks of two fighting bodies or from a ship which is wrecked, the presumption is that he is killed or drowned. So, according to Hanbal, the property should be divided after four years from the date of accident and the widow should be allowed to observe her *iddat*. But when there is no room for such a presumption, e.g., when a man has gone travelling or is away on a journey in connection with trade, and has not been heard of, Hanbal says, recourse must be had to the court to pronounce its judgement.[14] So, the court has been given the ultimate discretion of

declaring the missing person dead according to the facts and circumstances of each case.

Regarding the problem of who would be considered the heirs of the missing person adjudged deceased, again there is uncertainty. However, the prevailing view is that the living heirs of the missing person, at the time of the declaration of death by the court, would be entitled to succeed. In other words, the succession would be deemed open at the time of the decree of death.

Regarding (b), there is conflict of opinion about the presumption of death of the missing person. Among Shias, a lapse of ten years from the date of disappearance of a person gives rise to the presumption of death.[15] Some Sunni jurists have tried to reduce it to four years by adopting the analogy that the wife of a missing person can remarry after four years of his disappearance. Nevertheless, there is a lot of uncertainty. However, in India and Pakistan, Section 108 of the Evidence Act of 1872 has been followed according to which if somebody has not been heard of for seven years by those who would have naturally heard of him if he had been alive, then he would be presumed dead. So, in India and Pakistan a declaration of death can be obtained after seven years of the disappearance of a person.[16]

However, before the declaration of death, a missing heir would have his share in the property of a deceased Muslim reserved, and the share would be held in reserve for him until the time he reappears and claims it or until the time he is proved to be dead.[17] There is a difference of opinion as to the period during which the share of a missing person should be held for him; some have said 90 years; others 70, while 'moderns' generally have fixed the time at 60 years. But the recognized rule, as laid down in *Fath-ul-Kadir*, is that taking into consideration the circumstances of a particular case, the judge may give any direction as to the possibility of the missing person's death, and the period for which the partition should be delayed.[18] However, it can be concluded that the share of the missing heir will be held for him unless he has been declared dead by the court or a period of sixty years has elapsed. The share of the missing person is kept suspended for him, but the share of other heirs would be given over to them. If the missing heir returns, he would be entitled to his share and if he does not return, and is declared dead, the share reserved would devolve on the persons who were heirs of the praepositus at the time of his death and not on the heirs of the

return, or the judicial declaration of his death. To resolve the case, the estate would be arranged into fifty-six parcels: or the product of the parcels on the supposition of the missing person being alive, which was shown to be eight, multiplied by the number of parcels on the supposition of his death, which is seven. The husband's share on the supposition of the missing person being alive (four parcels) being multiplied by the number of the parcels on the supposition of death, or seven, the product is twenty-eight. In like manner, his share on the supposition of death (three) being multiplied by the number of the parcels on the supposition of life (eight), the product is twenty-four; which being the smaller, is surrendered to him, and his difference between the products, or four parcels, must be reserved to await the return or death of the missing person. The share of the sisters are subjected to the same operation and the results are fourteen parcels for the supposition of life, and thirty two parcels for that of death; and the difference (or eighteen parcels) must be reserved. The whole of what is immediately payable to the present heirs being thus 24 + 14 = 38 parcels, the share to be reserved for the missing brother is eighteen out of fifty-six if he is alive; four of these are to be restored to the husband, to make up twenty-eight parcels, the half of fifty-six, and the remaining fourteen added to the fourteen already paid to the sisters, make up the other half; but as the brother is entitled to a double portion, the whole fourteen are surrendered to him. If he is proved dead, the whole of the reserved eighteen parcels are to be delivered to the sisters, to complete their shares that is (14 + 18 = 32) thirty-two parcels, which it would be found are four-seventh of fifty-six.

Under the laws in Egypt, Syria, Tunisia and Algeria, if the missing person is found to be alive after his death has been declared by a court, he shall receive his share that has been given to the other heirs. Under the Kuwaiti law, the missing person appearing after his being declared dead by the court shall take back what is left of his original share with other heirs.[21]

4. Captive

A captive is subject to the same rules as other Muslims in respect of inheritance, unless he renounces Islam in which case he would be subjected to the same rules as an apostate.[22] If it is not known as to

they shall not inherit from each other. For the purpose of this provision, it is irrelevant whether they died simultaneously or at different times, in the same accident or not. Their respective estates shall be divided among their heirs who survive them at the time of the death of the *praepositus*.[1]

6. Step-Relations

Step-relations have no right of inheritance from each other.[32] There is no tie of consanguinity between them. Therefore, a stepson and a stepmother are not heirs to one another.

Notes

6

The Sunni Law of Inheritance

It has been discussed in the earlier Chapters that Hanafi school of law has the largest following among the Sunnis. In particular, the Muslims of the South Asian sub-continent, with very few exceptions, are followers of the Hanafi school. Abu Hanifa and his disciples, Abu Yusuf and Imam Muhammad, worked very hard to draw up an exhaustive scheme of the law of inheritance. Other Sunni schools of law accept the scheme of the law of intestate succession drawn up by the Hanafi school with a few exceptions here and there. The following study of the Sunni law of inheritance is primarily based on the Hanafi doctrines. However, departures made by any other Sunni school are discussed below wherever they occur.

1. Certain Fundamental Rules of Inheritance

There are certain fundamental assumptions or rules of inheritance on which the edifice of the Sunni Scheme of inheritance is built. These assumptions or rules run through the entire law of inheritance and they are applied strictly to all situations arising from time to time with a very few exceptions.

(a) The Pre-Islamic agnatic succession and Quranic modification:

The Sunni law has substantially retained the pre-Islamic customary tribal law recognizing only the male agnates as heir, and modified it by adding a number of heirs who have been so ordained by the Quran. However, male agnate relatives generally remain in a dominant position through the female relatives receive substantial portion of the estate of the deceased by way of shares allotted to them in the Quran. The

praepositus but by any nearer relative of the same class.[2] A nephew of the deceased will be excluded by the deceased's brother, whether the latter be his own father or uncle. A son's son is excluded by a son whether he be his own father or uncle.

(d) The Rule of Priority of Blood-tie:

The system of inheritance gives due weight to the strength of the blood-tie. Relatives of full-blood are preferred over relatives of half-blood among the male agnate collaterals in the same degree of relationship. Relatives are divided into three categories with regard to blood ties; full, consanguine and uterine. Relatives of full-blood or full relatives are those whose parents are the same. Consanguine relatives are those whose father is the same, but mothers are different. Uterine relatives are those whose mother is the same but fathers are different. Among agnate relatives of the same class and the same degree, full relatives have priority over consanguine relatives and the male descendants of full relatives have priority over the male descendants of consanguine relatives in the same degree of relationship.

(e) The Principle of *ta'sib*:

Among the agnatic heirs of the deceased, the male converts the female in the same degree of relationship into a Residuary regardless of the fact that such a female has been assigned a Quranic share. This is known as the principle of *ta'sib*.[3] A son converts his sister, the daughter of the praepositus, into a residuary heir and takes double the portion. This rule of a male taking double the portion of a female, amongst the agnatic heirs, when they take as Residuaries, applies throughout in the Sunni law. Thus a full brother takes double the share of a full sister, a consanguine brother takes double the share of a consanguine sister, a son's son takes double of a son's daughter etc. Of the group of female Quranic heirs, only the wife, grandmother and uterine sister are unaffected by *ta'sib*. The strict rule of succession converting female members who are Quranic heirs into residuaries by a male relative of the same class, degree and strength of blood-tie and then assigning double share to the male clearly establishes the superiority of the male agnates as legal heirs.

The Determination of Heirs

To determine the heirs of a Muslim, usually three questions arise for consideration on the demise of the person:

i. Whether the deceased has left any heirs?

ii. Which among the possible heirs and successors are entitled to succeed him as his actual heirs?

iii. What shares are allotted to the actual heirs?

These questions have been answered by the Sunni schools by categorising the possible heirs into classes, of which three are principal and four are subsidiary and then by framing rules for determining the actual heirs entitled to succeed and the shares to which they would be entitled.

The three principal classes of heirs are:

i. The Quranic heirs who are called 'sharers' for convenience of reference.

ii. The agnatic heirs called 'Residuaries' for reference.

iii. The uterine heirs called 'Distant Kindred' for reference.

The four subsidiary classes of heirs are:

i. Succession by Contract,

ii. The Acknowledged Kinsman,

iii. The Universal Legatee,

iv. The State.

3. The Possible Heirs of the Deceased

(a) The Principal Classes of Heirs:

According to the Sunni law the property of the deceased devolves, in the first instance, on the Quranic heirs or Sharers, that is, Class I. If the estate is not exhausted by them, it devolves on the agnatic heirs or Residuaries, that is Class II. And finally, in the absence of heirs of Class I and Class II, the property is distributed among the uterine heirs or Distant Kindred, that is Class III.[5]

These three principal classes of heirs together comprise all the blood relations of the deceased, whether they are agnates or cognates, and relationship by marriage, the husband or the wife. The subsidiary heirs succeed only by way of exception.[5]

Before going into the details of the Sunni scheme of inheritance, the principal and the subsidiary classes of heirs are discussed here:

(i) Quranic Heirs or Sharers:

The Quran deals very exhaustively with the law relating to inheritance, and the first class of heirs consists of those close relations of the deceased to whom specific shares are allotted by the Quran. The term 'Sharers' does not exactly convey the meaning of the Arabic expressions *Ashabul-faraid* or *dhawaul-furud*. The meaning of these expressions is something like 'possessors of obligatory share'. Because of the difficulty of finding another suitable English word describing exactly the said Arabic expressions, the term 'Sharers' is used for describing the Quranic heirs. This term was used first by A. Rumsey while translating *Al-Sirrajiyyah* and later on it was adopted by Baillie in his '*A Digest of Mohammadan Law*' followed by renowned writers of Muslim Law like D.F. Mulla, F.B. Tayyabji, S. Amir Ali, etc. Since the Quran prescribes specific fractional shares, the possessors of these fractional shares are conveniently called 'Sharers'.

As the shares are fixed by the Quran, they are obligatory in the highest sense and their possessors take precedence over the other two classes. This rule, however, does not mean that the 'Sharers' take the bulk of the property. On a careful analysis of the usual cases, the rule may be explained like this—take the whole of the property; and take slices (that is, the fixed shares) out of it and assign them to the Sharers; and let the residue, being in most of the cases the bulk of the property, go to the tribal heirs, called the Residuaries.[6] The first class, the Quranic heirs, consists mainly of females, with a few exceptions. The reason is that the bulk of the property, in majority of the cases, is sought to be kept intact for the second class of heirs, the Residuaries, who are mostly male agnates. For example, a person dies leaving behind a mother, a wife, and a son. The widow and the mother of the deceased are Quranic heirs or Sharers and will get their fixed shares, that is, 1/8 and 1/6 respectively. The son who is a tribal or agnatic heir or a Residuary, will take the residue of the estate, that is 1-(1/8 plus 1/6) = 17/24, the bulk of the

thus become 'distant' relations, in as much as there is no direct obligation to defend the group from aggression.[8] *Al-Sirrajiyyah*, however, defines a 'Distant Kinsman' as 'every relative, who is neither a Sharer nor a Residuary'.[9]

(iv) Conclusion

Summing up, it may be said that the most ancient and most important class of heirs, according to Sunni Law, is Class II, that is, 'Residuaries'. Unless the deceased leaves behind a large number of Quranic heirs or Sharers, the bulk of the property goes to them. Even if the deceased leaves behind some 'Sharers', only slices of the property are given to them, and the remaining estate is divided among the 'Residuaries', then the property goes to the nearest Distant Kinsman: the only exception being that the spouse even though a Sharer, does not exclude a Distant Kinsman. Hence, where the deceased leaves behind the spouse and no other Sharers or Residuaries, then after assigning the fixed share to the spouse, the remaining estate would go to the Distant Kinsman. In all other cases the presence of a Sharer or a Residuary completely excludes the Distant Kindred from inheritance.

(b) The Subsidiary Classes of Heirs:

If no member of the three principal classes mentioned above exists, the estate of the deceased goes to the subsidiary heirs, among whom each class excludes the next.

(i) The Successor by Contract:

The first of the subsidiary class, recognized by the Sunni law, is the 'successor by contract'. Succession by contract arises in two ways: (1) by emancipation, and (2) by friendship. The first situation arises when a man emancipates his slave, the former can inherit from the latter. However, the slave cannot inherit from the master. This kind of succession by contract no longer exists because of the non-existence of slavery in the present day Muslim world. Under the second form, a 'successor by contract' is a person who derives his right of succession under a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom to which the deceased will

4. The Actual Heirs of the Deceased

Since all possible heirs cannot succeed at the same time and some have to be excluded by others, therefore, a determination of the order of succession would be necessary. For this purpose, the Sunni law provides for 'rules of preference', which are also called 'rules of exclusion'.

These rules can be categorised into two:

1. Those by which some classes are excluded by others. For example, Sharers exclude Residuaries if their shares exhaust the entire estate, or the Sharers and the Residuaries together exclude Distant Kindred.
2. Those by which some heirs in each class are excluded by others. These rules are separate for each class.

(a) Sharers:

Sunni law prescribes circumstances under which an heir would succeed as a Sharer. Some Sharers are excluded by other heirs and some are converted into Residuaries under certain circumstances.

(b) Residuaries:

There are two sets of rules of exclusion: (i) those which divide the Residuaries into four classes and provide for the exclusion of a lower class by a higher class; and (ii) those which determine preference within each class.

(c) Distant Kindred:

There are two sets of rules for Distant Kindred; (i) those which divide them into four classes and provide for exclusion of a lower class by a higher class; and (ii) those which determine preference within each class.

All these rules are explained in detail later in this chapter.

5. The Rules for Allotment of Shares to Actual Heirs

There are two rules regarding the allotment of shares to actual heirs:

1. The rules for allotment of shares, which lay down what shares are to be allotted to the various claimants are separate and there are different rules for each class. These are discussed in detail later in this chapter.
2. The rules for the adjustment of shares, that is, rules that set down how adjustment is to be made if, on allotment of prescribed shares, it is found that their sum exceeds unity. This allotment is made by the application of the doctrine of increase, explained later in this chapter. Sometimes a contrary adjustment is required to be made when, on the allotment of specific shares, their sum total adds up to less than unity and there is no Residuary to take the residue. In such a case, the Doctrine of Return (explained later in this chapter) is applied.

6. Certain Important Terms Defined

Before going into the details of the main scheme of the Sunni law of inheritance, certain words and expressions used frequently in this chapter and the following chapters, are defined below.

1. 'Lineal relationship' is the relationship between two persons, one of whom is a descendant in a direct line of the other.[15] Every generation constitutes a degree, either ascending or descending. The persons through whom lineal relations are traced are said to form 'links', and are called intermediate ancestors.[16]
2. 'Collateral' means a person having a common ancestor with the deceased; but who is neither a descendant nor an ascendant of the deceased.
3. 'Agnate' means a person related to the deceased without the intervention of any female link.[17]
4. 'Cognate' means a person related to the deceased through one or more female links, whether or not there are male links intervening as well.[18]

5. 'True Grandfather' means a male ancestor between whom and the deceased no female intervenes.[19] For example, father's father, father's father's father and his father how high so ever (hhs), are all true grandfathers.
6. 'False Grandfather' means a male ancestor between whom and the deceased a female intervenes.[20] For example, mother's father, mother's mother's father, mother's father's father, father's mother's father are all false grandfathers.
7. 'True Grandmother' means a female ancestor between whom and the deceased, no false grandfather intervenes.[21] For example, father's mother, mother's mother, father's mother's mother, mother's mother's mother, father's father's mother are all true grandmothers.
8. 'False Grandmother' means a female ancestor between whom and the deceased, a false grandfather intervenes.[22] For example, mother' father's mother is a false grandmother.
9. 'Consanguine Sisters and Brothers' are the children of the same father but of different mothers. The 'Consanguine relationship' consists of the (a) consanguine brothers and sisters of the deceased, (b) consanguine uncles and aunts how high so ever (hhs) of the deceased; (c) the descendants how low so ever (hls) of the consanguine brothers and sisters of the deceased;[23] or (d) the descendants how low so ever (hls) of the consanguine uncles and aunts how high so ever (hhs) of the deceased.
10. 'Uterine Brothers and Sisters' are the children of the same mother but of different fathers. Uterine Relations consist of the (a) uterine brothers and sisters of the deceased; or (b) the uterine uncles and aunts how high so ever (hhs) of the deceased; or (c) the descendants of uterine brothers and sisters;[24] or (d) descendants how low so ever (hls) of the uterine uncles and aunts how high so ever (hhs) of the deceased.
11. 'Son's son how low so ever' means a descendant of the son in lineal male descent, notwithstanding how distant he may be from the deceased.[25]
12. 'Son's Daughter how low so ever' includes son's daughter, son's son's daughter and daughter of a son how low so ever.[26]

7. The Principal Heirs and their Rules of Succession

For explaining the main scheme of Sunni law of inheritance, the principal heirs of him will be taken up individually as under:

(a) The Sharers:

As already stated, Sharers are those heirs who have been named in the Quran and have been assigned specific shares. These are twelve in number, two of them being relations by marriage, that is husband and wife, and the rest of them are relations by consanguinity or blood. They are as follows: (1) Husband, (2) Wife, (3) Father, (4) True Grandfather h/s, (5) Mother, (6) True Grandmother h/s, (7) Daughter, (8) Son's Daughter h/s, (9) Full-Sister, (10) Consanguine Sister, (11) Uterine Brother and (12) Uterine Sister.

i Husband. The husband of the deceased gets 1/4 of the estate in case the latter has left behind a child or child of a son h/s. In case she leaves no child or child of a son h/s, then the husband takes 1/2 of the estate of the deceased wife. The husband can never be excluded from inheritance but can only take as a Sharer. Where a deceased leaves behind her husband and no other Sharer or Residuary but only a Distant Kinsman, then the husband will take his 1/2 and the remaining 1/2 will go to the Distant Kinsman or Kinswoman, as the case may be. Proof of a valid marriage with the deceased, under the Islamic law, is sufficient to establish the right of inheritance for the husband. No rights of inheritance exist under an irregular marriage. If the marriage is dissolved by an act proceeding from the wife during her death-illness, and then she dies during the *iddat*, the husband is entitled to inherit. The husband takes no part in the Return (explained later on in this chapter), but suffers reduction by the application of the doctrine of Increase (also explained in this chapter later on) proportionately with other heirs.

ii Wife. The wife of a deceased gets 1/8 of his estate, in case he leaves behind a child or the child of a son. In case he leaves behind no child or child of a son h/s, then the wife's share will be 1/4. The wife is never excluded from inheritance but can only succeed as a Sharer. If there are more wives than one, they divide the 1/8 or 1/4, as the case may be, equally amongst themselves.

Only the wife, who is validly married, is entitled to succeed to the share; but not a wife with an irregular marriage or *muta* (temporary) marriage. Chastity is not a condition for the widow inheriting her husband's property, as is the case in the Hindu law; because a Muslim husband has the power of divorcing his wife at his free will and any further safeguard is considered unnecessary.[27] The wife's claim to her unpaid dower and her right to live in the house of her husband during *iddat* (4 months and 10 days after the death of her husband), takes precedence over the rights of inheritance of other heirs. The marriage stands de facto or is deemed so to stand on the death of a spouse, while the wife is still in her *iddat* of a revocable repudiation (a divorce that can be called off). Under Hanafi and Maliki (but not Shafii) law, the wife is entitled to inherit if the irrevocable repudiation is made during the husband's death-illness, and the wife has not expressly or implicitly consented to the repudiation (*talaq*). This rule is adopted in the Egyptian, Syrian and Kuwaiti Laws of Personal Status.[28] The wife also does not exclude a Distant Kindred, in the absence of other Sharers or Residuaries, but inherits with them. Similarly, she does not take part in Return but suffers reduction in her share proportionately with other heirs by the application of the doctrine of Increase.

iii Father. The father of the praepositus is another principal Sharer who cannot be excluded under any circumstances. He take 1/6 of the estate of the deceased when the deceased has left no child or child of a son h/s. Sometimes, the father takes in both the capacities, as Sharer as well as Residuary. This happens only when the deceased has left behind a daughter or daughters, or a daughter or daughters of a son h/s as well as his father as his heirs, and the whole estate is not exhausted; the residue is then given over to the father. The father excludes the brothers and sisters of the deceased and more remote heirs. The reason is that the brothers and sisters are considered to be related to each other through their father and thus applying the principle of nearer in degree excluding the more remote; the father, being nearer in degree of relationship to the deceased than his brothers and sisters, excludes them.

iv Mother. The mother is another principal Sharer and always inherits from her deceased son. She takes 1/6 of the estate of the

deceased when he is survived by a child or child of a son hls. She also takes 1/6 when the deceased has left two or more brothers or sisters or even one brother and one sister, whether full, consanguine or uterine. Her share, however, is increased to 1/3 of the estate when the deceased left no child or child of a son hls and no more than one brother or sister, if any. In case the deceased is survived by the spouse and the father, besides the mother, then she will take 1/3 of what remains after deducting the share of the spouse.

There was considerable controversy about the reduction of the share of the mother from 1/3rd of the entire estate to 1/3 of the residue left after assigning the share to the spouse. According to the view favoured by many, particularly Ibn Abbass, the mother was entitled to a Quranic portion of 1/3 in absence of any lineal descendants or more than one collaterals. Applying this rule strictly, the result would have been that, in comparison with a husband who takes 1/2 of the estate, the mother takes 1/3 and the father, as Residuary, 1/6, while in comparison with the wife, who takes 1/4, the mother takes 1/3 and the father takes 5/12 as Residuary. This view was firmly rejected by all Sunni schools and they insisted on giving the Quranic 1/3 out of the residue left after allotting the share to the spouse. The mother in these circumstances takes half of what the father does. Thus, in comparison with the husband, the mother takes (1/3 x 1/2) 1/6 of the estate and the father 1/3 of the estate as Residuary; and in comparison with the wife the mother takes 1/4 and the father 1/3 of the inheritance. Sunni law claims these solutions on the authority of the general consensus of the Prophet's contemporaries following the view of Umar, the second Caliph of Islam. The real reason behind such interpretation of the Quran in this matter was simply the refusal to accept the possibility of the mother of the deceased taking a greater share in the inheritance than the father.[29] Nevertheless such interpretation was fully in accord with the general scheme of Sunni law of inheritance which envisages double the share of a male to that of a female in the same degree of relationship. Conversely, in the case of heirs being the husband, the father and the mother; the mother (1/3) getting twice than that of the father (1/6) would have created an anomaly for which there is no parallel in the entire Sunni law of inheritance.

True Grandfather hhs: The true grandfather hhs of the deceased replaces the father in the latter's absence. He is totally excluded by the father, but if the father is dead then the nearest true grandfather takes his place, and all the rules governing the share of the father will be applied to him. The rule of nearer in degree excluding the more remote also applies to the ascendants of the deceased. Therefore, the nearer true grandfather will totally exclude a distant true grandfather. However, the true grandfather does not step into the shoes of the father in two cases. Firstly, in competition with the spouse and the mother, he does not reduce the share of the mother (1/3rd) of the residue left after assigning the share of the spouse. The reason is very clear. He is not in the same degree of relationship with the deceased as the mother. Secondly, the majority of the Sunni schools, Hanafi excepted, agree that the true grandfather does not, as the father does, exclude the full or consanguine brothers and sisters of the deceased from succession.[30] The reason is again obvious. The agnatic brothers and sisters are excluded by the father because on the death of the latter, they would anyway be succeeding him as his sons and daughters which is not the case with the true grandfather whose own heirs might be much more varied.

Abu Hanifa following the opinion of some eminent Companions of the Prophet, including Abu Bakr, the first Patriarchal Caliph, rules that the true grandfather excludes the siblings. All the other three Imams and the two Hanafi Companions, following the opinion of Ali Ibn Abi Talib, maintain that the siblings are not excluded, but differ on the share of the true grandfather with them. Imam Malik, whose doctrine is followed in Tunisia, Morocco, Algeria and Kuwait, rules that the grandfather shall take the more advantageous to him of one-third of the estate, or as a co-residuary with the siblings if there is no sharer; if there is, then the better part of his entitlement as a co-residuary, that is, either one-sixth, or one-third of the residue. In the famous Akdari case, the total of his and the sister's shares are divided between them in the proportion of two to one. This provision of the Tunisian Article 146 is further illustrated in the Moroccan and Algerian Articles 258 and 175 respectively. A woman dies leaving a husband, a mother, a full or consanguine sister and a true grandfather. The shares of the grandfather and the sister shall be added together, and then divided, with the male taking twice

as much as the female. With the proportionate rebatement, the whole estate shall be divided by 27, the husband receiving nine, the mother six, the paternal son and the grandfather eight parts. Under the Egyptian Law (Art. 32), the true grandfather receives the more favourable share of a brother as a co-residuary, or as a sharer (one-sixth) if there are brothers and sisters. If there are sisters who inherit as sharers, he shall get the same advantageous share as a sharer (one-sixth) or as a co-residuary. This provision is also adopted under Syrian Article 299.

vi. True Grandmother hhs: The true Grandmother hhs takes 1/6 of the estate of the deceased if he is not survived by his mother or a nearer true grandmother. There are two types of true grandmothers, paternal or maternal. The paternal true grandmother is excluded by the former father, nearer true grandmother, paternal or maternal, and by the nearer true grandfather. The maternal true grandmother can only be excluded by the mother or a nearer true grandmother, paternal or maternal. The reason why the maternal true grandmother is not excluded by the father or a nearer true grandfather, is that the maternal true grandmother is not connected to the deceased through the father or true grandfather. However, according to the view of the Hanbali school the father does not exclude the paternal grandmother because Hanbalis regard all grandmothers as a single class. The Malikis and Shafiis do not exclude remote maternal grandmothers through nearer paternal grandmothers. Thus, where P's three sole surviving heirs are his father, F, and two grandmothers—FM, his father's mother, MMM, his mother's mother's mother; according to Hanafi law, FM being nearer grandmother than MMM would exclude her but would be herself excluded by F. Under the Maliki and Shafii laws, F excludes FM but not MMM and FM also does not exclude MMM. Thus, MMM takes 1/6 as her share and F takes the residue 5/6. This view is adopted in the laws of Egypt (Article 33), Syria (Article 238/1, 2), Tunisia (Article 141), Morocco (Article 255), Algeria (Article 161) and Kuwait (Article 51 [e]). Under the Hanbali law, FM excludes MMM being nearer grandmother but is not excluded by F. FM takes 1/6 as her share with F taking the residue (1/6).[33] In case there are two true grandmothers, one paternal and the other maternal, and both are of the same degree of relationship from the deceased and both of

them are entitled to succeed; then, they will inherit together, thus dividing the share of 1/6 equally between themselves.

vii. Daughter: A daughter takes as a Sharer only when there is no son. As a Sharer, the daughter, if there is one, takes 1/2 of the estate of the deceased and, if two or more, they collectively take 2/3 of the estate, which they divide equally among themselves. With a son, she takes as a Residuary, a son taking double the portion of a daughter.

viii. Son's daughter hls: The son's daughter hls, if there is one, takes 1/2 of the estate of the deceased and if there are two or more, they collectively take 2/3 which they divide equally among themselves. The son's daughter is entitled to these shares only when there is no son, daughter, higher son's son, higher son's daughter or equal son's son. Son or higher son's son, higher son's daughter or equal son's son excludes her totally. But if there is only one daughter or higher son's daughter, and there is also lower son's daughter, then the daughter or higher son's daughter, will take 1/2 as her share, the lower son's daughter will take the residue of what was to be assigned to two or more daughters or son's daughter. So, she will take 2/3 - 1/2 = 1/6. If there are more than one lower son's daughters in this case, then they will divide this 1/6 equally among themselves. With equal son's son, she takes as a Residuary in accordance with the principle of each male taking double the portion of each female. There is one exception to the strict principle of *ta'sib* that occurs in the case of son's daughter hls. If a great grandson must share his residual entitlement with a granddaughter of equal degree, he must *perforce* (for all the strong reasons) share it with a granddaughter who is nearer in degree to the praepositus than himself and who would otherwise not inherit.[34]

The following example will make this exception clear. A praepositus leaves behind the following heirs and the distribution will take place according to the aforesaid exception as under:

Father:	1/6 (as sharer)
Mother:	1/6 (as sharer)
Daughter:	1/2 (as sharer)
Son's daughter:	1/4 x 1/6 = 1/24
Sons son's son:	1/2 x 1/6 = 1/12
Sons son's daughter:	1/4 x 1/6 = 1/24

Table of Sharers—Sunni Law

Sharer	Normal share		Conditions for inheritance of normal share	Shares as varied by special circumstances
	of One	Two or more divided equally		
1. Father	1/6		When there is a child or child of a son hls.	The father inherits as a sharer and is a residuary with a female descending heir, and as a residuary in the absence of any descendant.
2. True Grandfather hhs	1/6		When there is a child or child of a son hls and no father or nearer true grandfather.	With no father, the same as for father above. With full or consanguine brothers or sisters (a) according to Malik, the more advantageous of 1/3 or a brother's share in the absence of sharers, with a sharer the more advantageous of a brother's share, 1/6 or 1/3 of the residue, taking twice a full sister's share out of their shares total (b) Egyptian Law the more advantageous of a brother's share of 1/6 or as a residuary with sisters inheriting as sharers
3. Husband	1/4		When there is a child or child of a son hls	1/2 when there is no child or child of a son hls
4. Wife or Wives	1/8	1/8	When there is a child or child of a son hls	1/4 when there is no child or child of a son hls
5. Mother	1/6		As for father above. OR when there are two or more brothers or sisters, or one brother and one sister, whether full consanguine or uterine	1/3 when no child or child of a son hls and no more than one brother or sister (if any). When there is also a wife or husband as well as the father, only 1/3 of remainder after deducting the husband's or wife's share

Table of Sharers—Sunni Law (Contd.)

Sharer	Normal share		Conditions for inheritance of normal share	Shares as varied by special circumstances
	of One	Two or more divided equally		
(6) Consanguine sister	1/2	1/2	When no child, child of a son hls, father, full brother or sister or consanguine brother	No share at all with the father, an inheriting male descendant hls, a full brother or a full sister becoming residuary with daughters. No share when there are two full sisters unless there is a consanguine brother with whom she becomes a residuary and takes 1/2 his share. 1/6 as a sharer on her own or sharing it with like sister/s where there is one full sister and no consanguine brother. As a residuary with an inheriting female descendant
(7) Uterine brother or sister	1/6	1/3	When no child, child of a son hls, father, or true grandfather	A male receives the same share as a female

(b) The Residuaries:

Residuaries are all those persons for whom there is no specified share and who take the residue after the Sharers have been satisfied. They take the whole estate if there is no Sharer. *Al-Sirrajiyyah* classifies the Residuaries into three; the Residuary in his own right, the Residuary in another's right and the Residuary with another.[35]

The Residuary in his own right (*asaba bil nafs*) is defined as 'every male into whose line of relationship to the deceased no female enters.'[36] This is the most important class and includes the main male agnatic heirs like the son, the son's son hls, the father, the brother, the paternal uncle and his son and so forth. These were the most important heirs under the pre-Islamic law; and they continue to retain their importance to a

but get their fixed share. Equal son's daughter takes as a Residuary with equal son's son. Usually, the higher son's daughter takes as a Sharer and not as Residuary with lower son's son. In case the higher son's daughter cannot inherit as a Sharer, she can take as a Residuary with lower son's son. In all cases, each son's son hls takes double the share of each son's daughter when the son's daughter hls becomes a Residuary with a lower son's son, and if there is a son's daughter hls, equal in degree with the lower son's son, she shares with them, as if they were all of the same grade. Suppose the deceased leaves behind two daughters (Ds), one son's daughter (SD), one son's son's son (SSS) and one son's son's daughter (SSD), the distribution shall take place in such a way that the two daughters (Ds) get 2/3 of the estate collectively as Sharers and the remaining 1/3 of the estate is divided amongst SD, SSS and SSD as residuaries, with a male taking double the portion of a female, that is, SD and SSD each takes

1/4 x 1/3 = 1/12 and SSS takes 1/2 x 1/3 = 1/6.37

(ii) The Ascendants of the Deceased:

1. Father: As mentioned before, the father takes as a Sharer in the presence of a child or child of a son hls, but in their absence, he becomes a Residuary. Only the spouses, the daughters, son's daughters and the mother (in her default, true grandmother hhs) can take as Sharers in the presence of the father, and he takes the residue after their fixed shares are assigned.
2. True Grandfather hhs: True grandfather hhs takes as a Residuary in default of the father, the child or the child of a son hls of the deceased. He steps into the shoes of the father as residuary in his absence, subject to certain limitations discussed before.

Only the Malikis among the Sunnis differ on the priority of the true grandfather over the full and consanguine brothers, making them of the same right to succession to the estate, after the father and before the male descendants of the said brothers. The Hanafis alone rule that the true grandfather excludes the full or consanguine brothers from inheritance in the same way as he unanimously excludes the uterine. But all modern Arab legislators, following the Malikis, treat him as equal to the agnate brothers, provided his share shall not be less than

Then come the remoter male descendants of No. 11 and No. 12, that is, the son's son of No. 11, then the son's son of No. 12 and so on in like order.

(iv) The Descendants of a True Grandfather hhs:

When there is no Residuary belonging to any one of the above-mentioned three classes, then Residuaries in this class succeed in the following order:

1. Full Paternal Uncle;
2. Consanguine Paternal Uncle;
3. Full Paternal Uncles' Son;
4. Consanguine Paternal Uncles' Son;
5. Full Paternal Uncles' Son's Son;
6. Consanguine Paternal Uncles' Son's Son.

Then come the remoter descendants of Nos. 17 and 18, in the same order and manner as the descendants of Nos. 11 and 12.

If there are no male descendants of the paternal grandfather belonging to the class of Residuaries, then, male descendants of the remoter paternal grandfather hhs can succeed as Residuaries. They succeed in the same order and manner as the deceased's paternal uncles and their sons and son's sons and so on.

Regarding the general rule of exclusion among Residuaries, it may be sufficient to say that every member of a higher class of Residuaries totally excludes every member of a lower class; and, within each class, a Residuary of a higher order (as given above) will totally exclude every Residuary lower in order to him. In other words, it can be said that, unlike Sharers, the Residuaries succeed on a knockout basis; a Residuary of a higher order totally excluding a Residuary of a lower order.

8. The Doctrine of Increase or *Awl*

The Doctrine of Increase (*awl*) is the method of reducing the sum total of the shares to unity, in case, after assigning the shares to the Sharers, it is found that the sum total of the shares exceeds unity. The share of

each Sharer will be proportionately reduced and this is done by applying the following method:

a. First reduce the shares to a common denominator.

b. Next, increase the denominator so as to make it equal to the sum of the numerators while letting the numerators remain the same.

Example: Suppose the deceased leaves a wife, two daughters, a father and a mother, the sum total of their shares (i.e. 1/8, 2/3, 1/6 and 1/6 respectively) will then exceed unity. By applying the Doctrine of Increase the shares are first reduced to a common denominator, which will be 24 in this case. So the share 3/24 + 16/24 + 4/24 + 4/24 = 27/24.

Now after increasing the denominator to the sum of the numerators, i.e. 27, while the numerator remained the same, the shares will now become 3/27 + 16/27 + 4/27 + 4/27 =27/27 = 1.

So the shares are proportionately reduced bringing their total down to unity. Thus the shares of the wife, two daughters, the father and the mother, after applying the Doctrine of Increase, will be 1/9, 16/27, 4/27 and 4/27 respectively.

This Doctrine is reported to have originated in the 'Pulpit' case—*al-Minbariyya*. Ali, the cousin and son-in-law of the Prophet, was delivering a sermon on the inheritance law in the mosque, when he was interrupted by a questioner from the congregation who asked what a wife's share of the inheritance was when her deceased husband was also survived by both his parents and his two daughters. Without a moment's hesitation, Ali replied: 'The wife's one-eighth becomes one-nineth.'[40] Ali's musical arithmetic was extraordinary, but this result was reached by applying the Doctrine of Increase.

9. The Doctrine of Return or *Radd*

This doctrine is just the reverse of the Doctrine of Increase. Where a residue is left after assigning the shares to the Sharers and there is no Residuary to take it, then the shares of the Sharers are proportionately increased to make their sum total equal to unity. This is the doctrine of Return or *radd* and this right to revise the shares is technically called 'Return'. The husband or the wife is not entitled to the Return so long

as there is a Sharer (besides the husband or the wife, as the case may be) or a Distant Kinsman. If there is no heir besides the husband or the wife, then he or she will take the residue by Return. The method of the proportionate increase of the shares by Return is explained as follows:

a. Where there is no husband or wife, all the shares are reduced to a common denominator; and then the denominator is reduced so as to make it equal to the sum of the numerators while the numerators remain the same.

Example: A deceased Muslim left a daughter and mother as his heirs. The mother gets 1/6 and the Daughter 1/2. When these shares are added up they come to 1/6 + 3/6 = 4/6. Therefore, the doctrine of Return would be applied. As the sum total of the numerators is 4, therefore, the denominator will be reduced to 4, so as to make the shares of the mother and the daughter 1/4 and 3/4 respectively.

b. If the deceased leaves behind the spouse and only one heir (Sharer) besides the spouse, then that heir will take the whole of the residue left after assigning the share of the spouse. In case, there are more than one heir besides the spouse, then the shares of the other heirs are increased proportionately as explained in (a), and they are multiplied by the fraction of the estate that remains after the share of the spouse is set aside. For example, the deceased leaves behind a wife, a daughter and a mother as his heirs; first of all, the shares of the daughter and mother are increased from 1/2 and 1/6 to 3/4 and 1/4 respectively by the method explained above. Then the wife is given her share, that is 1/8, and in order to find out the exact shares of the daughter and the mother, their proportionate shares are then multiplied by the fraction that remains after apportioning the share of the wife, that is 7/8. So, the daughter will receive 3/4 x 7/8 = 21/32 and the share of the mother will become 1/4 x 7/8 = 7/32.

The Maliki law does not recognise Return or *radd*. According to the Maliki view, the residue of the estate in these circumstances should go to the public and be used for the general benefit of the Muslim community as a whole. Another reason for this view is that it is not permissible to allow any relative a share in the inheritance greater than that specified by the Quran. The Hanafi and Hanbali schools have always upheld the doctrine of Return relying on the Quranic text:

Two major doctrines exist to regulate cases of Distant Kindred. The Shafii and Hanbali schools adopt the doctrine of *tanzil*, under which the rights of these relatives are basically determined by reference to the link of the Sharers or Residuaries through whom they are connected with the praepositus. Therefore, they apply the system of representation. The Hanafi school, on the other hand, adopts the principle of *qaraba*, or 'relationship' under which rights of the relatives are determined by the nature of their own relationship with the praepositus.[45]

Under Hanafi law, Distant Kindred, like Residuaries, are divided into four classes. These are (i) Descendants hls of the deceased other than Sharers or Residuaries; (ii) Ascendants hhs of the deceased other than Sharers and Residuaries; (iii) Descendants hls of the parents of the deceased other than Sharers and Residuaries; and (iv) Descendants of the immediate grandparents of the deceased.

The list of Distant Kindred comprised in each of the four classes can be given as follows:

(i) The Descendants hls of the deceased:

1 Daughter's children and their descendants hls.
2 Children of the son's daughters hls and their descendants.

(ii) The Ascendants hhs of the deceased:

1 False grandfathers hhs.
2 False grandmothers hhs.

(iii) The Descendants hls of the parents of the deceased:

1 Full brothers' daughters and their descendants.
2 Consanguine brothers' daughters and their descendants.
3 Uterine brothers' children and their descendants.
4 Daughters of the full brothers' sons hls and their descendants.
5 Daughters of consanguine brothers' sons hls and their descendants
6 Sisters (full, consanguine or uterine) children and their descendants

10. The Rules of Succession of Distant Kindred

(i) Class I of Distant Kindred:

Descendants of the deceased through a female link:

The Distant Kindred of the first class, comprise the descendants of the deceased other than Sharers or Residuaries. The rules of exclusion within this class are:

1 The nearer in degree to the deceased excludes the more remote.[46] Thus, the son of a daughter will inherit to the exclusion of the son of the son's daughter.

2 When the claimants are in equal degree of relationship with the deceased, then the children of Sharers and Residuaries are preferred to those of the Distant Kindred. For example, a son's daughter's son, being a child of a Sharer (son's daughter) succeeds in preference to a daughter's son's son, who is a child of a Distant Kinswoman (daughter's son).

From the above two rules, the order of succession among the Distant Kindred of the first class can be laid down as follows:

1 Daughter's children.
2 Son's daughter's children.
3 Daughter's grandchildren.
4 Son's son's daughter's children.
5 Daughter's great-grandchildren and son's daughter's grandchildren.
6 Other descendants of the deceased in like order.

Of the above mentioned groups, each in turn must be exhausted before any one from the next group can succeed.

The principle governing the allotment of shares, among the Distant Kindred of the first class, can be discussed under the following situations:

1 If the claimants are of equal degree of relationship with the deceased and there is no child of a Sharer or a Residuary among them, or all of them are related through a Sharer or

share of the female ancestor will descend to the claimant claiming through her, irrespective of the gender of the claimants. Abu Yusuf's doctrine takes into account only the genders of the actual claimants and any difference of gender in the intermediate ancestors is not taken into account. Among the claimants, however, the distribution is made with a male getting double the portion of a female.

Example: A deceased leaves behind a daughter's son's daughter and a daughter's daughter's son as explained in the following table:

Deceased		
Daughter	Daughter ---------	First Line
|	|	
Son	Daughter ---------	Second Line
|	|	
Daughter	Son ----------	Third Line

According to Imam Muhammad, the rule is to stop at the second line where the ancestors differed in gender and assign the shares to them. Thus the daughter's son will get 2/3 and the daughter's daughter will get 1/3, and the former's share (that is 2/3) will descend to his daughter and the latter's share (that is 1/3) will descend to her son. Opposite results will be arrived at by applying the doctrine of Abu Yusuf, according to which only the genders of the claimants are taken into account. Thus, the daughter's son's daughter will get 1/3 and the daughter's daughter's son will get 2/3.

b Another case can be where there are three or more claimants, each claiming through different lines of ancestors. Here again, according to Imam Muhammad, the rule is to stop at the first line where the genders of the intermediate ancestors differed and distribute the shares there, a male ancestor getting double the portion of a female ancestor. However, in this case the share of each ancestor will not descend to the claimants claiming through them, but the collective shares of all the male descendants will be divided among all the claimants claiming through them and the collective shares of all the female descendants will be divided among all the claimants claiming through them; in both cases a male

In another case there may be two or more claimants claiming inheritance through the same intermediate ancestor. In such a case, applying the doctrine of Imam Muhammad, the rule is to stop at the first line of descent where there is difference of gender and the further rule is to count for each such ancestor, if male, as many males as there are claimants claiming through him, and if female, as many females as there are claimants claiming through her, irrespective of the genders of the claimants.[49] Then, after the shares are assigned to intermediate ancestors as explained earlier, their shares descend to the claimants claiming through them, a male getting double the portion of a female.

Abu Yusuf's doctrine remains the same even in this case. The estate of the deceased is divided among the actual claimants, males getting the double portion, irrespective of the genders of the intermediate ancestors and, also, irrespective of how many claimants claim through one ancestor and so forth. All the actual claimants are on the same footing.

Example: A deceased Muslim leaves 5 descendants in the fourth generation as shown in the following table:

Deceased

Daughter	Daughter	Daughter ---------- First Line
Son (S1)	Daughter (D1)	Daughter (D2) --------- Second Line
Daughter	Daughter (D3)	Son(S2) ---------- Third Line
Son (S3) Daughter (D4)	2 Sons (S4, S5)	Daughter (D5) --------- Fourth Line

Now the actual claimants are S3, D4, S4, S5 and D5. Applying the doctrine of Imam Muhammad, the first rule is to stop at the second line of descent where the genders differ. The second rule is to count, in this second line, for each ancestor, if male, as many males as claimants claiming through him, and to count for a female ancestor, as many females as claimants claiming through her. Thus S1 having two claimants

...ken into account; whereas, according to Abu Yusuf, the strength of ...e blood of the claimants themselves is considered. This situation ...ccurs because Islam permits marriage between first cousins, and when ...he intermediate ancestors marry between themselves, then their ...children are said to be connected to the praepositus through two ...ntermediate ancestors and are supposed to get an advantage over those ...who are only connected to the deceased through one line of ancestors. ...An example can make clear the difference between the two doctrines ...with on this point.

Example: The deceased left the following claimants, D3, D4 and S2 who are connected to the deceased through the following intermediate ancestors:-

Deceased

Daughter	Daughter	Daughter
|	|	|
Daughter(D1)	Son (S1)	Daughter (D2)
(They intermarried)	|	|
|	|	Son (S2)
2 Daughter (D3, D4)		

According to the doctrine of Imam Muhammad, the rule is to stop at the second line of ancestors where there is difference of genders, and assign the share there. Thus the daughter (D1) will be counted as two daughters, because there are two claimants claiming through her, and the son (S1) will be counted as two sons (or four daughters) because there are two claimants claiming through him too. The daughter (D2) will be counted as one daughter only, because of one claimant claiming through her. So, the estate will be divided in seven parts, 2/7 going to D1, 4/7 to S1 and 1/7 to D2. S1, being the only male in that line of descent, his share will go down to his two daughters D3 and D4 who will each take 2/7. But the share of D1 and D2 cannot directly descend to their heirs but will be added up, as explained before, and given out jointly to their children. Thus, their joint share (i.e. 2/7 + 1/7 = 3/7) will descend to their children D3, D4 and S2, a male getting double the portion of the female. Thus D3 and D4 will get 1/2x3/7= 3/14 (each getting 3/28), and S2 will get 1/2 x 3/7 = 3/14. D3 and D4 had already

3 Among claimants in the same degree, those connected to the deceased through Sharers exclude those connected through Distant Kindred.[51] The mother's father's father will be excluded by the mother's mother's father; because the latter is connected to the deceased through a Sharer (mother's mother) and the former is connected to the deceased through a Distant Kindred (that is, mother's father); though both claimants are in the same degree of relationship from the praepositus.

If the claimants be equal in degree of relationship from the deceased, and none of them is related through a Sharer or Residuary or all of them are related through Sharers, and there is no difference in the gender of the intermediate ancestors and they are related to the deceased through the same side (that is, the father or the mother of the deceased); then the property will be divided among the actual claimants, a male getting double the portion of a female, regardless of intermediate ancestors. If the gender of the intermediate ancestors differ, then the property is divided among the first line of ascent where there occurred a difference in gender and the shares are distributed at that stage, a male getting double the portion of a female. Then, their shares ascend to the claimants claiming through them according to the rules prescribed above for the first class of Distant Kindred under the doctrine of Imam Muhammad. The doctrine in the case, is applied upward to the ascendants, as it was done downwards to the descendants in the case of Class I of the Distant Kindred. It is, however, not clear whether Abu Yusuf in this case differed with Imam Muhammad in succession to the ascendants as he did in the matter of descendants.

4 Ascendants can be divided into two categories, paternal and maternal. The claimants, who are related to the deceased through his mother, are said to be on the maternal side. The rule is that if the claimants are related to the praepositus through both the sides, two-thirds would go to the paternal and one-third to the maternal sides without regard to the gender of the claimants.[52] The claimants on the maternal side, even if there is only one, will succeed jointly to one-third of the total estate and the claimants on the paternal side, even

descendants of full brothers and sisters exclude the descendants of consanguine brothers and sisters and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This difference arises from the fact that Abu Yusuf takes into account the 'blood' of the claimants while Imam Muhammad takes into consideration the 'blood' of the roots, that is, brothers. In other words, Imam Muhammad applies the doctrine of representation with the descendants of brothers and sisters representing their respective ancestors in 'roots'. The view of Imam Muhammad holds good in India and Pakistan, whereas, Abu Yusuf's view prevails in the Middle Eastern countries.[56]

Taking up the first two rules, with the third rule given by Imam Muhammad, the order of succession in this class can be laid down as follows:

1. Full brother's daughters, full sister's children and the children of the uterine brothers and sisters.
2. Full Sister's children, children of uterine brothers and sisters, consanguine brother's daughters, and consanguine sister's children, the consanguine class taking the residue, if any.
3. Consanguine brother's daughters, consanguine sister's children and children of uterine brothers and sisters.

The above three categories consist of those nephews and nieces who are not Residuaries.

4. Full brother's son's daughters (children of Residuaries).
5. Consanguine brother's son's daughters (children of Residuaries).
6. Full brother's daughter's children, full sister's grandchildren and grandchildren of uterine brothers and sisters.
7. Full sister's grandchildren, grandchildren of uterine brothers and sisters, consanguine brother's daughter's children and consanguine sister's grandchildren, the consanguine group taking the residue, if any.
8. Consanguine brother's daughter's children, consanguine sister's grandchildren, and grandchildren of uterine brothers and sisters.

The above mentioned categories (from 4 to 8) consist of those grandnephews or nieces who are not Residuaries. The remoter descendants

2 After determining the shares of the 'roots', the next step is to assign its shares to the uterine group. If there is only one claimant in that group, he will be assigned 1/6, being the hypothetical share of his root. But if there are two or more claimants in this group, whether descending from one or more uterine brothers or sisters, they will be jointly assigned 1/3, being the hypothetical share of their parent or parents, and it will be equally divided among them without distinction of gender.

3 Then the hypothetical shares of the full and consanguine brothers and sisters will descend to the claimants claiming through them, in the same manner and according to the same rules as mentioned above in the case of the Distant Kindred of the first class.

The allotment of shares, according to Abu Yusuf, shall be made to the actual claimants per capita, the male getting double the portion of a female.

Example: A Sunni Muslim dies leaving behind four grandnephew claimants, S3, S4, S5, and three grandniece claimants, D4, D5 and D6, as shown in the following chart (S stands for son and D for daughter):

Deceased

Uterine Brother	Uterine Sister	Consanquine Brother	Consanquine Sister		
					D3
S1	D1	D2	S2		
D4	S3	S4 D5	S5	D6	S6

As there are two claimants in the uterine group, D4 and S3; the collective share of the uterine brother and sister being 1/3, will pass to D4 and S3, each taking 1/6.

The residue being 2/3 will first be divided between the consanguine brother and sister. As there are two claimants claiming through the consanguine brother, he will be counted as two consanguine brothers and as there are three claimants claiming through the consanguine sister, she will be counted as three consanguine sisters. Thus 4/7 of the residue (that is 2/3) will be given to the consanguine brother who will

1 Uterine paternal uncles and paternal aunts (ammat) and all maternal uncles and aunts (khalat or akwal) of the deceased. Only full and consanguine paternal uncles are excluded because they are Residuaries.

2 The descendants hls of all the paternal and maternal uncles and aunts of the deceased other than sons hls of full and consanguine paternal uncles who are Residuaries. However, in this group, the nearer in degree excludes the more remote.

3 Paternal and maternal uncles and aunts of the parents of the deceased, other than full and consanguine paternal uncles of the father who are Residuaries.

4 The descendants hls of all the paternal and maternal uncles and aunts of the parents of the deceased, other than sons hls of the full and consanguine paternal uncles of the father who are Residuaries. However, in this group, the nearer in degree excludes the more remote.

5 Remoter uncles and aunts and their descendants hls will succeed in the same manner and order.

Of the above mentioned group, each in turn must be exhausted before any member of the next group may succeed.

The rules of Succession for the first group (that is, uncles and aunts) are discussed below:

a If there are claimants both on the paternal as well as maternal sides, the former will collectively take 2/3 and the latter will collectively take one-third. Each side will divide its collective share according to the rule of the double portion to the male.[57] Even if there is only one heir on either side, he takes the whole share assigned to his side.

b Among the claimants on the same side, those of full-blood are preferred to those of the half-blood, and among those of the half-blood, the consanguine relations are preferred to the uterine relations.

c The uncles and aunts on the paternal and maternal side inherit together and no claimant on either side can exclude any claimant on the other side.

paternal side and one-third to the maternal side.[59] Even if there is only one representative on one of the sides, he will take the entire share assigned to his side. Paternal and maternal sides can only inherit together when the claimants on each side are in the same line of descent, otherwise a claimant of higher descent or nearer in relationship on one side maternal or paternal, will totally exclude claimants of lower descent on the other side.

c Among claimants on the paternal side in the same degree of relationship, those of full-blood are preferred to those of half blood. Thus descendants of full uncles and aunts are preferred over descendants of consanguine and uterine uncles and aunts. Among descendants of half-blood, descendants of the consanguine uncles and aunts are preferred to the descendants of the uterine uncles and aunts. The rule applies both to the paternal and the maternal sides, and it is to be applied separately to each side.

d Among claimants on the paternal side, the children of Residuaries will be preferred to the children of Distant Kinsmen, when the claimants are in the same degree of relationship. Thus the daughter of a full paternal uncle, who is a Residuary, will exclude the daughter of a full paternal aunt, who is a Distant Kinswoman. This rule does not apply to the descendants on the maternal side, because none of the maternal uncles and aunts is a Residuary.

e After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side according to the rules as laid down earlier for the Distant Kindred of the first class. However, the same conflict of the doctrines of Imam Muhammad and Abu Yusuf will arise here as in the case of the first class of Distant Kindred, the portion assigned to the maternal side is also to be distributed according to the same principle.

Where relatives connected with the praepositus through different sharers and Residuaries, vary in their degree of removal from the heirs they severally represent, the relative nearer in degree to the heir represented (i) under Shafii law excludes all other relatives; (ii) under Hanbali law excludes all other relatives of the same general class.[61] Hanafi and Shafii law are thus similar on this point. Any nearer relative, whether on the paternal or maternal side, would exclude all distant relatives on either of the two sides under the Hanafi and Shafii doctrine. But, under the Hanbali doctrine, the nearer relative on the paternal or maternal side excludes distant relatives on its side alone and not those of the other side. Thus, under the Hanbali law, a distant relative on the paternal side can take the position assigned to his side notwithstanding a nearer relative on the maternal side.

Notes

1. Al-Mughani of Ibn Qudama, VI, 166
2. N.J. Coulson, *Succession in the Muslim Family*. Cambridge: Cambridge University Press, 1971, pp. 33-34.
3. Ibid., pp. 41-42.
4. A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd edn., London: Oxford University Press, 1964, p. 189
5. Ibid., p. 390.
6. Ibid., p. 391
7. Ibid., p. 392
8. Ibid., p. 393
9. A. Ramsey, *Al-Sirrajiyyah*, London: Premier Book House, 1959.
10. M.D. Manek, *Handbook of Mohammaden Law*, 6th edn., 1961, p. 169.
11. Supra, Note 4, p. 394.
12. B.R. Verma, *Muhammadan Law in India and Pakistan*, 4th edn., Bombay: N.M. Tripathi, 1968, p. 421.
13. D.F. Mulla, *Principles of Mahomedan Law*, 16th Edn., Bombay: N.M. Tripathi, 1968, p. 97.
14. Ibid.
15. F.B. Tayvabji, *Muhammadan Law*, 4th edn., Bombay: N.M. Tripathi, 1968, p. 814.
16. Ibid., p. 815
17. Ibid.
18. Ibid.
19. Supra, Note 13, p. 58.
20. Ibid
21. Ibid
22. Ibid
23. Supra, Note 15, p. 815

7

The Shia Law of Inheritance

The Shia scheme of inheritance, compared with that of the highly complex and detailed Sunni scheme, is brief and simple. This scheme has been primarily worked out by the Ithna-Ashari School of Shia law and is followed by other Shia schools of law, like Ismailies, Zaidies etc. The outstanding characteristic of the Shia law of inheritance is its refusal to afford any special place or privileged position to agnate relatives as such. This basic approach to the subject of inheritance has two principal effects. In the first place, all blood relatives are embraced by a single and comprehensive system of priorities and there is no major division, such as exists in the Sunni law because of Residuaries and Distant Kindred. In the second place, females and non-agnatic relatives stand on an equal footing with male agnates in the sense that they exclude any relative who occupies an inferior position in the order of priorities.[1] Thus, the two schemes, though based on the Quran, are very different from each other in their implications.

Like the Sunni law of inheritance, the Shia law of inheritance has also to resolve the three basic questions reproduced as under:

Question No. 1: Who are the possible heirs and successors of the deceased?

In order to resolve this question, all possible heirs, whether principal or subsidiary, would have to be determined. Theoretically, there are two divisions of heirs under the Shia law: heirs by marriage and heirs by consanguinity. These two divisions include all the principal heirs, Sharers and Residuaries. In their absence, there can be some subsidiary heirs

4 The Sharers are the mother and the surviving spouse.

5 Heirs who are both Sharers and Residuaries are the father, the daughter or daughters, the full or consanguine sister or sisters, and the uterine sisters and brothers.

(b) All heirs who are not specified above are Residuaries.

1. The Manner of Distribution Among Heirs

Distribution among heirs, after ascertaining which of the heirs would succeed either as Sharers or Residuaries or together with some as Sharers and others as Residuaries, the distribution is made in the following manner:[6]

a. First of all the share of the husband or wife, as the case may be, is allotted;

b. the rest of the estate is distributed among heirs by blood according to separate rules for each group; and

c. adjustment of shares is made by doctrine of Increase or Return, if need be.

2. Possible Heirs

According to Shia law, there are two causes giving rise to a claim for inheritance:

1. *Nasab*, that is, consanguinity or blood relationship. Consanguinity implies simply a tie of blood. The blood relations of the deceased are entitled to succeed to the property of the deceased under the rules discussed later in this chapter. These blood relations consist of those who are assigned specific shares in the Quran and are called 'Sharers', and who take the residue after satisfying the Sharers and are called 'Residuaries'.

2. *Sabab*, that is, a special cause giving a right to succession to the property of the deceased. One kind of specified cause is the relationship by marriage, that is, being a spouse. A spouse is a principal heir and is never excluded by any other heir. Spouses are given specific shares in the Quran and are thus, included in the category of Sharers. The other kind of succession by *Sabab* can take place by performing certain acts. An emancipator of

divided. They can also be called the 'principal heirs'. The subsidiary heirs, as mentioned before, can only succeed to the estate of the deceased in the absence of all the principal heirs.

4. The Subsidiary Heirs

When there is nobody from among the principal heirs available to succeed to the estate of the deceased Shia, the subsidiary heirs can succeed. The subsidiary heirs, under the Shia law, are not the same as those under the Sunni law. Even if, at times, they tend to be the same, but they are governed by different rules. There are three kinds of subsidiary heirs:

(a) Emancipator of a Slave,

(b) Indemnifier of the wrongs of others, and

(c) The Imam or the Religious Leader of the Shias.

(a) The Emancipator of a Slave:

Sunni law also provides the right of the emancipator to inherit from his emancipated slave, and is considered to be 'successor by contract'. This right of succession, under the Sunni law, is an absolute right; but the same is not the case under the Shia law and the emancipator succeeds to the inheritance of the freed man only under certain well-defined conditions, which are:

(i) That the emancipation should be absolutely voluntary and without any consideration. In case the slave had bought his liberty, or emancipation was obtained on payment of a ransom, or emancipation was carried out in the course of a duty, or in the expectation of heavenly reward, or the emancipation was the result of law, then the emancipator does not obtain the right of succession.

(ii) If, after emancipation, the emancipator continued to have responsibility for the wrongful acts of his emancipated slave. However, if the emancipator's responsibility had ceased by operation of the law or by virtue of a special contract at the time of manumission, he would have no right of inheritance to the estate of the emancipated slave.[7] This right of succession, however, is only of antiquarian value, because the

of the Shias; secondly, there is no way of determining a mujtahid in place of the Imam these days; and thirdly, it is very difficult to make an equitable and proper distribution among the poor and indigent of the place unless the property is substantial so that a charitable trust can be created. In view of all these difficulties, the prevalent view, at least in India and Pakistan, is that, under these circumstances, Shia Muslims' property escheats to the government.[12]

5. The Actual Heirs

The actual heirs who inherit the estate of the deceased, can only be determined after applying certain rules of exclusion among the possible heirs. General rules of exclusion among the groups of possible heirs mentioned above, are discussed below:

1. Heirs by consanguinity and marriage succeed together. First of all, the husband or wife, as the case may be, is assigned his or her share. The remaining estate is divided among the heirs by consanguinity in accordance with the rules of exclusion amongst them.
2. Among the heirs by consanguinity, whilst there is a single member of the first group existing, those who belong to the second and the third group are absolutely excluded from succession.[13] When there are no existing members of the first group, then the members of the second group succeed to the complete exclusion of the members of the third group. When there are no members from the first and the second group; only then, the members of the third group are entitled to succeed.
3. The members of the two sections within each group succeed together.[14]

6. The Allotment of Shares

After determining the actual heirs who are entitled to succeed to the property of the deceased, the next step is to assign the shares to them. For the purpose of assignment of shares, the heirs are divided into two classes:

(a) Sharers

(b) Residuaries

Tables of Sharers—Shia Law

Sharers	Normal share		Conditions under which the share is inherited	Share as varied by special circumstances
	of one	of two or more collectively		
1. Husband	1/4		When there is a lineal Descendant	½ when no such Descendant
2. Wife	1/8	1/8	When there is a lineal Descendant	¼ when no such Descendant
3. Father(a)	1/6	-	When there is a lineal Descendant	If there be no lineal Descendant, the father inherits as a residuary
4. Mother	1/6	-	(a) When there is a lineal Descendant; or (b) When there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father	1/3 in other cases
5. Daughter	1/2	2/3	When no son	With the son she takes as a residuary
6. Uterine brother or sister	1/6	1/3	When no parent, or lineal descendant	
7. Full sister	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father	The full sister takes as a residuary, with the full brother and also with the father's father
8. Consanguine sister	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father	The consanguine sister takes as a residuary with the consanguine brother and also with the father's father

privilege, under the Shia law, of participating proportionately in the 'Return' left after assigning the shares to the Sharers but does not lose anything by application of the Doctrine of Increase. In other words, he is immune from the Doctrine of Increase.

4 Mother: The mother, being a principal heir, is never excluded from inheritance. The mother is assigned 1/6 of the estate, when the deceased is survived by a lineal descendant; or, when there is a father along with two or more brothers (full or consanguine) or one such brother and two such sisters or four such sisters. They must be actually existent. A sibling unborn at the time of the death of the deceased is not counted in the quorum and does not reduce the mother's share to one-sixth. Article 892 of the Iranian Law, however, does not debar an unborn brother or sister from being counted towards the quorum.[20] In default of these heirs, the share of the mother increases to 1/3.

5 Daughter: In the absence of a son, the daughter is taken as a Sharer. A daughter takes 1/2 and, if there are two or more, they collectively take 2/3, which they divide equally among themselves. With a son, the daughter is taken as a Residuary, the male taking double the portion of a female.

6 Full Sister: The full sister, if there is one, inherits 1/3 of the estate of the deceased. If there are two or more full sisters, they take 2/3 collectively, dividing the same equally among themselves. A full sister inherits her share provided the deceased is not survived by his mother, father, a lineal descendant or full brother or father's father. As the full sister belongs to the second group of the heirs, she is totally excluded by the heirs of the first group, that is, parents and lineal descendants of the deceased. A full brother, belonging to the second group, takes with a full sister as a Residuary, male taking double the portion of a female. The father's father, belonging to the same class, is also counted as a full brother and takes as Residuary with the full sister in the same manner as a full brother. Similarly, the paternal grandmother is counted as full sister and participates in succession like a full sister.

7 Consanguine Sister: Consanguine sister, if there is one, takes 1/2 of the estate of the deceased. If there are two or more consanguine sisters, they take 2/3 collectively, dividing it equally among themselves. The consanguine sister succeeds to her share provided

These grandparents, since they are grouped with brothers and sisters, are factionally treated as brothers and sisters. The paternal grandfathers are equated with full or consanguine brothers and paternal grandmothers are equated with full or consanguine sisters. The maternal grandfathers and grandmothers are equated with uterine brothers and sisters. In this manner the distribution of the estate of the deceased amongst heirs of the second class is simplified.

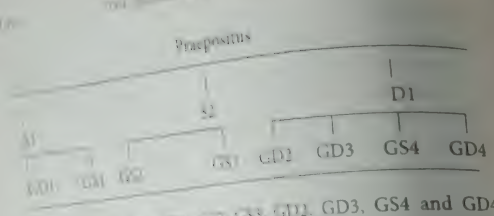
(b) The Residuaries

All heirs other than Sharers are Residuaries.[21] Their descendants hls are also Residuaries. Of the nine Sharers mentioned above, there are four who, under certain circumstances, inherit as Residuaries. These are the (1) father, (2) daughter, (3) full sister, and (4) consanguine sister. As to the last three, the rule is that where anyone of them would have, if living, inherited as a Sharer, her descendants would also inherit as a Sharer, and, if she would have inherited as a Residuary, her descendants would also inherit as Residuaries.

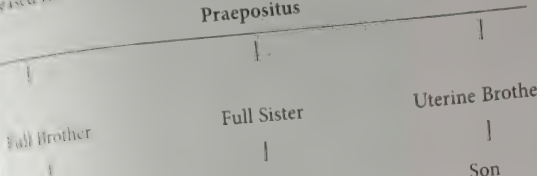
Before getting into the mode of distribution of property to each of the three group of heirs, it is important to mention that succession among descendants in each of the three groups of heirs is per stirpes, and not per capita.[22] This is because of the fact that the Shia law recognises the doctrine of representation in a limited sense for the purpose of calculating the share of each heir—as distinct from the purpose of ascertaining the heirs. For this limited purpose, the Shia law throughout accepts the principle of representation as a cardinal principle.[23] Following this principle for the limited purpose, the descendants of a predeceased son, provided they are heirs, take the portion which he, if living, would have taken; and in that sense they represent the son. Similarly, the descendants of the deceased's daughter, sister, brother, uncle or aunt, if heirs, would take the portion which their ancestors, if alive, would have taken.

On account of limited application of the doctrine of representation, the succession among descendants, in each of the three classes is per stirpes.

Example: A Shia Muslim praepositus leaves behind him the following heirs, who are children of his predeceased two sons and a daughter.



Example: A Shia praepositus is succeeded by the children of his predeceased full brother, full sister and uterine brother, given as follows:



The distribution is first made among the full brother, full sister and the uterine brother. The uterine brother is a Sharer who will be given his specified share, that is 1/6, which will descend to his son. The full brother and full sister will take as the Residuaries, thus the full brother getting 2/3 x 5/6 = 5/9, and the full sister getting 1/3 x 5/6 = 5/18. The full brother's share, that is 5/9, will descend to his daughter and the full sister's share, that is 5/18, will go to her son.

7. The Principles of Distribution Among the Three Groups

a. The Distribution of Shares Among the Heirs of the First Group:

As already pointed out, the first group of heirs consists of two sections, parents and the lineal descendants of the deceased. The two sections inherit together and do not exclude one another. However, the heirs belonging to this group totally exclude heirs from the other two groups.

The distribution of the property among the heirs of this group, under the Shia law is made by taking the following steps:

1. First of all, if the deceased is survived by the spouse, then the spouse is assigned his/her share and the residue devolves upon heirs belonging to the first group.
2. If there is no spouse, then the whole of the estate devolves upon the heirs belonging to the first group.

The distribution among descendants, by applying the principle of representation, has been codified in Iran under Articles 911 and 912 as under:

Article 911—if the praepositus has left no children, their children's children shall take their place under the right of representation and shall share the estate with the surviving parent or parents of the deceased. As for distribution among grandchildren, it shall apply by stirpes that is to say, the heirs of each descendant shall inherit the share of their ascendant who they represent and who forms their link with the praepositus. For example, the share to be inherited by the children of the praepositus' son shall be twice that devolved upon the praepositus's daughter.

Article 912—The descendants of the deceased, how-low-soever, shall inherit in accordance with the previous title.[25]

5 In case the deceased has left a parent or parents and also sons and daughters, or in their default their lineal descendants; then first of all, the parents will be given their fixed share, and the residue will be divided among the children or, in their default, among the lineal descendants of the children, according to the procedure mentioned above. If there is only one parent with daughters, he/she shall receive one-sixth, the daughters two-thirds and the residue shall be divided in the proportion of one-fifth for the parent, and four-fifths to be shared by the daughters by applying the principle of Return.

b. The Distribution of Shares Among the Heirs of the Second Group:

If there are no heirs of the first group, the estate (minus the share of the husband or wife, if any) devolves upon the heirs of the second group.[26] This group consists of two sections: (a) grandparents, paternal or maternal, how so ever high, and (b) brothers and sisters, and their descendants, how so ever low. The two sections do not exclude each other, but among the members of each section the nearest succeed.[27] As the heirs are divided into two sections, there are three possibilities regarding the surviving relations, in this group:

1 Grandparents hhs, without any brothers or sisters or their descendants:

These principles are codified in the Iranian Article 923, which reads as follows:

'If the sole heirs of the deceased are grandfathers or grandmothers, the estate shall be divided among them in the following manner:

If it is solely the grandparent, whether on the mother's or father's side of the deceased, she/he shall succeed to the whole estate.

If there are several grandparents, the estate shall be distributed among them on the basis that the male shall receive twice the share of the female on the paternal side, while the maternal grandparents shall receive equal shares.

If the paternal grandparents inherit with the maternal grandparent, one-third of the estate shall be equally shared among the maternal grandparents and the remaining two-thirds shall devolve on the paternal descendants, with the male receiving twice the share of a female.'[31]

The shares will be allotted to the remoter grandparents per stirpes, according to the principle of representation, in the same way and manner as stated before in case of descendants of the children of the deceased.

2. Brothers and Sisters or their descendants, without any grandparents and remoter descendants:

(i) Let us first take the case when brothers and sisters are the only heirs. The distribution will be made according to the following rules:

(a) Brothers and sisters of full-blood exclude consanguine brothers and sisters.

(b) Uterine brothers and sisters are not excluded by full or consanguine brothers and sisters. Uterine brother or sister, if one, will take 1/6 and if more than one, will receive 1/3 of the estate collectively, and divide the portion equally among themselves regardless of gender.

(c) If there are full or consanguine sister or sisters, then their fixed shares will be assigned to them, that is, 1/2 when one, and 2/3 collectively when more than one. If there are full or consanguine sisters along with uterine brothers and sisters and/or spouse, and after assigning their fixed shares it is found that their sum exceeds unity, then the Doctrine of Increase will be applied bringing down the sum total of the

sisters receiving the residue which shall be divided according to the rules set above.

927. In all the cases treated in this section, the surviving spouse shall, first of all, receive his/her *Shariah* share, being half the estate for the widower and a quarter for the widow. The prescribed share shall also go to the relations of the deceased on the mother's side, be they the ascendants or brothers and sisters. If the sum total of shares exceeds the estate due to the survival of a spouse of the deceased, the shares of the full brothers or consanguine brothers and/or sisters or of ascendants shall be reduced accordingly.[32]

(iii) In the absence of brothers and sisters, the estate of the deceased will devolve upon their descendants, nearer in degree excluding the more remote. The estate (minus the share of the husband or wife, if any) will devolve upon the descendants of brothers and sisters, according to the principle of representation,[33] as mentioned before, for the descendants of children or the deceased. That is to say:

(a) The children of each full or consanguine brother or sister will take the portion which their father or mother, if living, would have taken as Sharers or Residuaries, as the case may be. Among them the estate will be divided according to the rule of double share to the male.[34]

(b) The children of each uterine brother or sister will take the portion which their father or mother, if living, would have taken as a Sharer, and they will divide it equally among themselves.[35]

(c) If there are no children of brothers or sisters, the estate will devolve upon the grandchildren of brothers and sisters according to the principle of representation, that is to say, the grandchildren of full or consanguine brothers and sisters would take the portion which their representative parents, if living, would have taken and divide it among themselves according to the rule of double share to the male, and the grandchildren of uterine brothers and sisters would take the portion which their representative parents, if living, would have taken and divide it equally among themselves without any distinction of gender.[36]

Example: The following are the heirs of the deceased and the distribution is made to them as follows:

Uterine Brother	= 1/9	1/3 collectively as Sharers
Mother's Mother (as uterine sister)	= 1/9	
Mother's Father (as uterine brother)	= 1/9	
Consanguine Brother	1/3 x 2/3 = 2/9	
Consanguine Sister	1/6 x 2/3 = 1/9	
Father's Father (as Consanguine Brother)	1/3 x 2/3 = 2/9	2/3 as Residuaries
Father's Mother (as Consanguine Sister)	1/6 x 2/3 = 1/9	

(d) The remoter grandparents hhs of the deceased stand in the place of the grandparents through whom they are respectively connected with the deceased. In the absence of brothers and sisters, their descendants stand in place of their respective parents.[38] In other words, the remoter ancestors and the descendants of brothers and sisters succeed together according to the principle of representation.[39]

Article 924 of the Iranian Law rules as follows on the inheritance of grandparents with brothers and sisters:

'If the ascendants of the deceased inherit with the uterine brothers/sisters, two-thirds of the estate shall go to the deceased's relations on the father's side, with the male getting twice the share of a female and the remaining one-third to the relations on the mother's side, to be shared equally between them

However, if the deceased leaves only a uterine brother or sister the share that devolves to either of them shall not exceed one-sixth.'[40]

c. The Distribution of Shares among the Heirs of the Third Group:

If there is not a single heir belonging to the first two groups, then the estate (minus the share of the husband or wife, if any) devolves on the heirs of the third group in the following order.

- If there be only one of them, 1/6;

(b) Divide the remainder among full paternal uncles and aunts according to the rule of the double share to the male, and in the absence of full paternal uncles and aunts, among consanguine paternal uncles and aunts according to the same rule.[44]

3 Lastly, the portion assigned to the maternal side (that is, 1/3) is divided among the maternal uncles and aunts as follows:

(i) Assign shares to uterine maternal uncles and aunts;

- If there are two or more of them, 1/3 to be equally divided among them.

- If there be only one of them, 1/6;

(b) Divide the remainder equally among full maternal uncles and aunts, and if there are none, among consanguine uncles and aunts.[45]

(4) If there be no uncle or aunt on the maternal side, the paternal side takes the whole. Similarly, if there is no uncle or aunt on the paternal side, the maternal side takes the whole.[46] However, the distribution within each side is governed by the same rules as mentioned in paragraphs (2) and (3) above.

Example: A deceased Shia Muslim is succeeded by the following heirs:

On the paternal side the heirs are the full paternal uncle, consanguine paternal uncle and the uterine paternal uncle. The paternal side will be assigned 2/3 and its distribution will be made as follows:

On the paternal side the heirs are the full paternal uncle, consanguine paternal uncle and the uterine paternal uncle. The paternal side will be assigned 2/3 and its distribution will be made as follows:

Full paternal uncle: (as Residuary) 5/6 x 2/3 = 5/9.

Consanguine paternal uncle:(excluded by full paternal uncle).

Uterine paternal uncle:(taking his share)

1/6 x 2/3 = 1/9.

[illegible] the consanguine maternal uncle and [illegible] will be assigned 1/3 as a whole [illegible] as follows:

[illegible]

(iii) [illegible] If there are no uncles and [illegible] will be entitled to [illegible] shall be determined according [illegible]

1. [illegible] will, on the principle of [illegible] the uncle and aunt, [illegible]

2. [illegible] of uncles and aunts will [illegible]

a. [illegible] on both sides—equally;

b. [illegible] (full or consanguine—[illegible] to the male).

3. In [illegible] descendants of uncles and aunts [illegible] of representation, [illegible] and shall, among [illegible] to the rule mentioned above.

If [illegible] aunts, the estate will [illegible] third class in order of [illegible] The distribution among higher [illegible] principle stated above for [illegible] among their descendants being [illegible] the descendants of the [illegible]

In the third [illegible] there is the possibility of some heirs [illegible] of the deceased as being [illegible] capacities and being heir [illegible] due to the fact that [illegible] cousins. Those who [illegible] of the deceased, the Shia

law gives a share by virtue of each title to such an heir, unless one title operates to the exclusion of other, in which case the heir receives his or her share by virtue of the superior title.[48]

For example, a woman dies leaving behind her a husband who is also her cousin (being the son of her paternal uncle); he will receive a share in inheritance as husband, as well as by virtue of the relationship of blood, that is being the son of the paternal uncle. But if the deceased leaves behind a uterine brother, who is also the son of her paternal uncle, he succeeds as a uterine brother, for in law, a uterine brother excludes the cousin.[49]

[illegible] Articles 928 - 38 inclusive deal with the inheritance of uncles and aunts and their descendants in the following manner:

'928 - If the deceased left no relatives of the second class, the estate shall devolve on heirs of the third class.

929 - A sole relation of the third class shall succeed to the whole estate. Among several such relations, the distribution of the estate shall proceed according to the following provisions:

930 - If the deceased left full or consanguine paternal aunts/uncles or maternal full or consanguine aunts/uncles, the maternal and paternal aunts/uncles who are the consanguine sisters/brothers of the deceased's mother/father shall be excluded by their full siblings, but shall replace them if there are not any.

931 - If the deceased left only paternal aunts/uncles, they shall equally share the estate if they are uterine brothers/sisters of the deceased's father. If they are full or consanguine brothers/sisters of the deceased's father, they shall share the estate, with the male taking twice the portion of a female.

932 - If the deceased left paternal aunts/uncles who are uterine sisters/brothers of the deceased's father, together with paternal aunts/uncles who are full or consanguine sisters/brothers of the deceased's father, they shall take one-sixth if on his/her own, and one-third to share equally if more. The residue shall devolve on the deceased's aunts and uncles who are full or consanguine sisters/brothers of the deceased's father with the male taking twice the share of the female.

457 / If the deceased left, with the full paternal cousin a maternal uncle or aunt or several paternal uncles and aunts, the full paternal cousin shall be excluded from inheritance, even if the paternal uncles and aunts are consanguine brothers/sisters of the deceased's father.

458 / In all cases provided for in this section, there shall be first taken from the estate the share of the surviving spouse, which is half the estate for the widower and a quarter for the widow then the share of blood relations on the deceased's mother side. The residue shall be divided among his relations on the father's side.[50]

8. The Doctrine of Return or *Radd*

The Doctrine of Return or *radd*, under the Shia law, is the same as under the hanafi law but for three exceptions. If after assigning the fixed shares to the Sharers, some residue is left over and there is no Residuary belonging to that group of heirs; then, the residue shall, subject to three exceptions, be divided among the Sharers in proportion to their respective shares. The following are the three exceptions to this rule:

1. Neither the husband nor the wife is entitled to return if there is any other heir. The husband, however, becomes entitled to the 'return' in the absence of other heirs. There had been difference of opinion regarding the wife's right to take the return in the absence of all other heirs. The older view was that the wife would take her share, that is 1/4, and the residue would escheat to the state. However, Ameer Ali has stated a different view, on this point, in the following words:[51]

> 'The early lawyers were of the opinion that neither a husband nor a wife is entitled to take by return, but later jurists have held that when the deceased leaves no other heir belonging either to the categories of Sharers or Residuaries (by blood) or uterine relations (Distant Kindred), the husband or widow takes by return. And this rule has been recognised and enforced in the British Indian and Algerian Courts.'

Ameer Ali's view has been followed by the Oudh High Court in its opinion in Abdul Hamid Khan V. Peare Mirza.[52]

2. The mother is excluded from the 'return', if the deceased left, besides her, a father and one daughter; and also:

Notes

1. J. Coulson, *Succession in the Muslim Family*, Cambridge: Cambridge University Press, 1971 p. 108.
2. B.R. Verma, *Muhammadan Law in India and Pakistan*, 4th edn., Bombay: N.M. Tripathi, 1968, p. 427.
3. Ibid.
4. Ibid.
5. Jamal J. Nasir, *The Islamic Law of Personal Status*, 2nd edn., London: Graham & Trotman, 1990, p. 246.
6. Supra, Note 2, p. 427.
7. S. Ameer Ali, *Mohammadan Law*, Vol. II, 6th edn., 1965, p. 96
8. Ibid.
9. Ibid.
10. Ibid., p. 97
11. Ibid.
12. Mousmat Khorsandi v Secretary of State (1926), 94 I.C. 433
13. Supra, Note 7, p. 95
14. Ibid.
15. A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd edn., London: Oxford University Press, 1964, p. 438
16. Ibid.
17. Ibid.
18. Abdul Hamid Khan v Peare Mirza, 153 I.C. 379 (1935).
19. Supra, Note 5, p. 90 quoting Articles 946, 947 and 948 of the Iranian Law.
20. Supra, Note 5, p. 108.
21. D.F. Mulla, *Principles of Mahomedan Law*, 16th Edn., Bombay: N.M. Tripathi, 1968, p. 101.
22. Ibid., p. 104
23. Ibid.
24. Ibid., p. 105
25. Supra, Note 5, p. 115
26. Supra, Note 21, p. 108
27. Supra, Note 15, p. 444
28. Supra, Note 2, p. 437.
29. Ibid., p. 438
30. Tahir Mahmood, *A Textbook of Muhamedan Law*, 6th edn., Allahbad: R.N. Lal, 1997, p. 379.
31. Supra, Note 5, pp. 125-126.
32. Ibid., pp. 122-123.
33. Supra, Note 21, p. 110.
34. Supra, Note 30, p. 371.
35. Supra, Note 21, p. 110.

8

A Critical Analysis of the Two Schemes of Succession and the Problems Relating to Them

1. The Difference between Sunni and Shia Schemes of Succession

It is apparent from the chapters on the Sunni and Shia laws of inheritance that the two schemes of inheritance differ substantially. This duplicity of the schemes is bound to give rise to certain complexities and complications, especially in countries where the population is divided between the two sects.

The difficulties usually arise under the following circumstances:

(a) After the estate of the deceased has been settled according to the principles of one of the sects, some allegedly aggrieved heirs seek declaration to the effect that the deceased belonged to the other sect and that the estate be settled according to the principles of the latter sect. This difficulty may be further aggravated when there is the demand that the disputed fact be resolved through evidence. The heirs, on whom the estate has been settled, and the heirs, who filed the declaratory suit, are usually very close relatives of the deceased and can effectively block the genuine evidence from coming to light.

(b) When the spouses belong to the different sects but have common heirs.

The problem of different, at times conflicting, schemes of inheritance is obvious in the countries where one of the sects is in the majority and the other is in a substantial minority. Examples are Pakistan (majority

a Muslim country would dare to enforce a law contrary to the religious beliefs of the people.

2. Certain Alleged Weaknesses

Certain critics of the law of succession have alleged that it generally suffers from rigidity and lack of flexibility. They advance the following reasons in support of their criticism:

a *Rigidity of the schemes of inheritance:* Most of the shares have been conclusively fixed and the praepositus, in his lifetime, is unable to change them according to his wishes. He is unable to cut the share of the heir apparent with whom he is displeased and increase the share of the one he is pleased with. This objection, though it seems valid on the face of it, is without substance for the following reasons:

i. The system is in itself flexible enough to change according to the changes in the circumstances. Certain Sharers become Residuaries under certain circumstances and, under certain other conditions, the shares of certain Sharers is increased or enhanced.

ii. By fixing the shares, a kind of certainty and order has been achieved as far as the dealings within the family are concerned. Islam has always encouraged preservation of the family unit, and, if an unlimited power was given to a person to decide who should get what portion of his estate after his death, it would have certainly resulted in favouritism creating rivalries within the family, ultimately leading to the break-up of the family unit.

c One of the objectives of Islam, as pointed out by certain theologians, is to achieve a just distribution of wealth. The law of inheritance furthers this objective by dividing the estate of the deceased into small fractions. Those who have contended that Islam favoured socialism, usually cite the law of inheritance to support their contention.

d A Muslim has complete authority under the Islamic law to divest himself of his property through gift (*hiba*). He can gift any portion of, or even the entire, estate to any of his heirs. Therefore, a person can disinherit any of his heirs with whom he is displeased by gifting his property to the heirs he is pleased with. However, in order to restrict any impulsive exercise of such

been added in the Iraqi Law of Personal Status, 1959. However, the reform is less remarkable in the case of Iraq, as compared to Sudan and Egypt, because the latter countries are predominantly Sunni while Iraq has an even number of Sunni and Shia populations. It was, indeed, the explicit purpose of the Iraqi Law of 1959 to unify the law by adopting here the Sunni and there the Shia doctrine, as the circumstances of modern life might seem to demand.[8] The Iraqi reform not only allows a parent to make special provision for a particularly needy child, or other relatives to make similar distinctions between one heir and another, but it also expressly permits a testator to distribute his whole estate, (not by item, between his heirs, provided only that this distribution does not favour some heirs at the expense of others in more than the extent of the 'bequeathable third'.

These reforms, to some extent, remedy the unenviable position of the widow, for it at least allows her husband to augment her paltry entitlement on intestacy by a bequest of up to one-third of his net estate. A further concession in her favour (and, indeed, in that of the widower) was made in Sudan by judicial Circular No. 28 of 1925, which provided that the spouse relict (widow or widower) might take the residual estate of the deceased, by the doctrine of the 'Return', in the absence of any agnate, quota Sharer, or other relative. Similar provisions are included in the Egyptian Law of Intestate Succession, 1943 (Art. 30), and the Syrian Law of Personal Status, 1953 (Art. 288).[9] The addendum to the Tunisian Law of Personal Status, 1956, Art. 143(2), which was promulgated in 1959, not only made provision for the 'Return in favour of quota Sharers in general, in accordance with the normal practice in the Sunni schools, but makes no distinction whatsoever in this regard between the spouse relict and others.'[10] This means that the Tunisian law, in contravention of the principle barring the spouse relict from participation in the 'Return' in the presence of any other heir, has allowed the spouse relict to share in the 'Return' with any other quota Sharer in the absence of any agnate.

In those Sunni countries, which have not introduced such reforms as mentioned above, there is still a way to overcome this difficulty. The Islamic law allows an unrestricted power to a person to make a gift *inter vivos* (a gift from one living person to

one eighth or one-quarter share can and should be taken into consideration in assessing the special share.

Here it may be mentioned that the difficulties caused by the so-called 'rigidity' of the system are more academic than actual. The success and effectiveness of a law can be measured from the innate acceptance of the law by the people on whom it is being applied. As the shares have been specifically mentioned in the Quran and since no Muslim can question the wisdom of any Quranic injunction, therefore, even if any sacrifice is required to be made because of the application of a Quranic injunction, it is done voluntarily and without any protest.

(iii) *Fragmentation of land holdings*: It has been alleged by certain critics that the operation of the Islamic law of inheritance leads to excessive fragmentation of landed property as a result of satisfying the multiple rights of numerous heirs at the time of opening of succession. This fragmentation of all kinds of property, landed, industrial or urban; because of the operation of the law of inheritance, has been justified by modern Muslims as a vehicle to restrict capitalism and feudalism, and to promote an equitable distribution of wealth. This reason could hold good in the Muslim world, where there was a live controversy regarding Islamic socialism. It is indeed interesting that the supporters of Islamic socialism, throughout the Muslim world, referred to the law of inheritance as an argument in support of their contention. They argue that Islam, through its law of succession, breaks up the estates of Muslims into so many small portions to be given over to so many different claimants that ultimately no one would be left with surplus wealth, and the object of an equitable distribution of wealth would be achieved. However, Islamic socialism is no longer a live issue in Muslim countries. Defects due to fragmentation of land holdings have at times been remedied, on occasion by legislation, which requires registration of all landed property in the first place. In such legislation, registration of less than a specified limit is not generally allowed. For instance, in Pakistan, paragraph 23 of the Martial Law Regulation No. 64 of 1959 provided that a joint holding below $12\frac{1}{2}$ or 16 acres (according to various regions) could not be partitioned, and further that a joint holding of more than $12\frac{1}{2}$ or 16 acres

(v) *Complications arising out of fractions*: Count Leon Ostrorog, the late Polish adviser to the Ottoman Government, criticized Islamic law of inheritance because of complications caused on account of fractions resulting from the allotment of the Praepositus' estate among so many heirs. This, he expresses, in the following words:[15]

"The necessity of providing shares to holders of so variable portions in the case brings about fractions of the most complicated character. One of the most simple cases is that of a man leaving a widow, a son and a daughter Chattels and real estate will then be divided in the proportion of 3/24ths to the widow, 7/24ths to the daughter, and 14/24ths to the son. But there are cases where such extraordinary fractions occur as 630/315ths, 840/140ths, and 210/5040ths. I need not say that I am quoting those figures from a standard Turkish treatise, concretely that the late Mahmud Es'ad Efendi, once a Professor at the Imperial School of Laws at Istambul. There are even cases where a computation conducted according to the rules of the law results in a mathematical impossibility, an addition of the legal fraction of the estate bringing about a total greater than the unit. For instance, a woman dies leaving husband and two sharers. In that case the share that the Law allocates to the husband is one half of the estate, but the Law declares at the same time that the sisters are to receive two thirds. Consequently, reduced to a common denominator, the legal allotment gives a total of 3/6 plus 4/6 = 7/6."

With due respect to the late Ostrorog, it can be said that there is hardly any merit in his argument. It is difficult to understand as to how mere fractions can create complications. The law of inheritance is sufficiently explicit and detailed, and provides adequate rules for calculating the exact share of each heir. One just has to apply simple arithmetic which the judges learn in school. When the estate has to be divided into portions, then the mere fact of large fractions should not horrify anybody. The fractions that he quotes from late Muhmud Es'ad Efendi—if not misprinted—are absurd to say the least. Fractions like 630/315 (equal to 2) and 840/140 (equal to 6) are not plausible as they are far more than unity and cannot be reached in any circumstances under the law of inheritance. The fraction 210/5040 is just inflated for its beauty, or otherwise, it is just another way of writing 1/24. As regards the last part of his statement, he perhaps was not aware of the Doctrine of Increase which is just provided to meet such a situation, where the sum total of the shares exceeds unity.

(vi) *Disparity in the shares of males and females*: Another criticism made against the Islamic law of inheritance is the disparity in the shares of

[illegible] from the deceased. [illegible] when it is noticed that [illegible] (like those of Germany, Switzerland, [illegible] on the basis of [illegible] it may appear to be weighty, is academic [illegible] a female has been [illegible] questions the [illegible] the disparity in the shares [illegible] grievance. Nevertheless, it was [illegible] for the first time recognized an [illegible] share of the estate [illegible] abolished at the end of [illegible] it existed, in one form [illegible] the fifteenth century. [illegible] to the male as against [illegible] had always had the [illegible] of this, it is obvious [illegible] In the United States and [illegible] although women are playing an [illegible] even in these countries [illegible] In the Muslim countries [illegible] bread earner and women are [illegible] would itself prove the [illegible] of males and females.

3 The Distinguishing Features of the Two Schemes of Inheritance

[illegible] of inheritance, makes it [illegible] simpler and more easily [illegible] than the Sunni scheme. This situation would raise a question [illegible] in the two schemes when both of them are based on the same Quranic injunctions? The answer to this question [illegible] have interpreted the same Quranic [illegible] differently. The difference in the two interpretations has been [illegible] by F.B. Tyabji as under:[18]

1. The [illegible] the principles of pre-Islamic customs to stand, and they add or alter those rules in the specific manner mentioned in the Quran, and by the Prophet.

2. The Shias deduce certain principles which they believe underlie the amendment mentioned in the Quran, and by fusing those mentioned in the Quran with the principles of pre-existing customary law, produce a completely altered set of rules.

For the Sunnis, the Quranic rules serve to qualify and mitigate the customary system of agnatic succession and do so, broadly speaking, only to the extent of their express terms. For the Shias, on the other hand, the particular regulations of the Quran embody, by implication, the general and fundamental principles of succession. It is this approach which constitutes the decisive determinant of Shia law, because it produces the two pre-eminently distinctive features of the system—the doctrines of priority by *qaraba* and of entitlement by representation.[17]

The difference between the approach of the two schemes can be discussed specifically by taking the points of difference one by one.

- The major difference in the two schemes is that the Sunni law recognizes the distinction between agnates and cognates while the Shia law does not. The general provisions of the Quran with reference to inheritance,[18] are:

Unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave.

(*Surah* 4:7);

Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned.

(*Surah* 4:32)

These Quranic provisions have been strictly interpreted by the Sunnis as retaining the substratum of the pre-Islamic customs.[19] The Quran has not been construed to alter or affect the basic conception existing in pre-Islamic Arabia regarding the proximity of kinship. So, the Sunni interpretation of the law permits those women alone to compete with the customary heir, in whose case the only bar to recognition (under the customary law) was their gender, viz. female agnates. The Shias, on the strength of the above quoted verses, removed the basic distinction made by the pre-Islamic custom between agnates and cognates. They interpret the Quran as placing those who are related through women, on a footing of equality with those related through men. The result is that with Shias the agnates have no priority over the cognates, and proximity is reckoned merely by counting the connecting links, whether

by adding away more than a third of the heritage) hath been paid.' (*Surah* 4:12).[25]

Wherein no mention is made that the males should have twice the share of females but the contrary is implied.[26]

There is also difference in the interpretation given by the Sunni and Shia jurists for women who have not been mentioned specifically in the Quran. The Quranic provision that the daughter is entitled to succeed with the son is interpreted by Shias as entailing all female descendants to succeed. Similarly, the mention in the Quran of the full and of the uterine brothers and sisters is taken to indicate that all the collaterals, male or female, whether of full-blood or half-blood, rank with the pre-Islamic customary heirs in their own line.[27] The Sunnis, on the other hand, give rights of inheritance to the sister (unless she comes into competition with an heir who excludes her), but no such right is given to the niece of the deceased, even though no customary heir nearer than herself survives to compete with her. The niece is relegated to the class of Distant Kindred. The Shia jurists take the provisions of the Quran as not restricted to the individual instances of the daughter or the sister, but as establishing a new principle for the benefit of females.[28] They turn their attention from the females amongst blood relations who are expressly mentioned in the Quran; viz, the daughter, the mother, the sisters. They find these females newly clothed with the title to inherit jointly with or in preference to the customary heirs, provided that the customary heirs are not nearer than themselves.[29] The Shias determine what relation exists between the said females and the customary heir when the females are so given the title to inherit. If remoter females bear a similar relation to the customary heir against whom they compete, then the Shia reason out in favour of remoter females having rights similar to those conferred on the nearer females specifically mentioned in the Quran. Thus, where those remoter females have to compete with claimants who, under the pre-Islamic customary law, would exclude them, but who bear, in comparison to them, no greater proximity to the deceased, then such remoter females are also given right to inherit—rights analogous to the daughters' or the sisters'. Therefore, a uterine sister's daughter is entitled (under the Shia law) to have the same right in the estate in competition with

[illegible] has in competition with a [illegible] half brother.[32]

d. Since the Sunnis [illegible] the rights of customary heirs or agnates have been kept [illegible] but the heirs specifically mentioned in Quran have been given their shares. The Sunni law thus lets the [illegible] customary law stand unaltered except to the extent to which it is clearly altered by express provisions of the Quran. Therefore, the Sunni law divides the heirs into three different classes: the Sharers (consisting of heirs specifically mentioned in Quran), the Residuaries (consisting mainly of agnates), and the Distant Kindred (consisting of cognates and [illegible]). The Shias do not leave the old rules of [illegible] as they were, but replace them by a set of rules consisting of [illegible] with Islamic reforms. They construe [illegible] in the Quran, as confined to the [illegible] laying down broad principles [illegible]. No doubt, the Shia law also classifies the heirs into Sharers and Residuaries but such classification is important [illegible] to the quantum of shares that the heirs would take. But, under the Sunni law, the classification of heirs becomes important [illegible] for the purpose of determining which of the [illegible] of the deceased are entitled to inherit. For example, an heir belonging to the third class (i.e., Distant Kindred) is totally excluded in the presence of any heir from the first two classes (excepting the spouse).

e. There is also a difference in the treatment of grand parents, how high so ever, under the two schemes. The Sunni law gives specific shares to the nearest true grandparents, hhs, in the absence of parents and they are entitled to inherit the shares of the parents along with the descendants of the deceased. But this is not the case under the Shia law. The grandparents (false or true, Shia law does not make any such distinction) are excluded by the descendants of the deceased. This is so because the verse about the relative proximity of parents and children, and the provision that the two ought to succeed concurrently, has received slightly different interpretations by the two sects, but the results have been very far reaching. The Sunnis have given a more literal interpretation to the Quran permitting any ascendants, how so ever high, to share in the estate with any descendant how so ever

[illegible] The Shias, on the other hand, extract a principle from the [illegible] given. They reason out that if the father of the praepositus is entitled to succeed with his own grandchildren (and failing them with the descendants of his own grandchildren), then the father's father of the praepositus ought similarly, in respect of [illegible], be placed in the same rank to his own grandchildren (i.e., with the brothers and sisters of the praepositus) and failing brothers and sisters with their descendants.[33] This is another illustration of the expansion in the Shia law of Quranic instances [illegible] into principles.

4. Conclusions

After reviewing the variance in the interpretation given to the relevant verses of Quran by the two schemes of inheritance, it may be useful to consider the differences in the interpretation mentioned above under the conditions prevailing in the present day world.

Firstly, the question arises, whether the distinctions drawn between the agnates and the cognates by the Sunni law are tenable under modern conditions? Such a distinction was appropriate when the population of Arabia was divided into several tribes and the individuals owed certain duties to their tribes. The male members of the tribe were supposed to fight for the honour and survival of their tribe, and thus, were given precedence over the female members of the tribe. At times, a female member of a tribe married a male belonging to some other tribe, and thus became a member of the latter tribe, retaining no duties and obligations to the tribe in which she was born. Family solidarity was possible on this wide, almost amorphous, scale and might have been necessary to withstand the competing claims of the tribes. However, the tribal basis of the society no longer exists in the Muslim countries, with the exception of a few instances.[34] In the present, this definition of the family does not hold good. Paternal uncles, even during the lifetime of their brothers, tend to become less involved in the lives of their nephews and nieces. On the other hand, a Muslim gives considerably greater attention to his own daughter, even long after her marriage, than to an agnatic nephew. The socio-economic structures of Muslim countries have undergone great, indeed unavoidable, changes. The change from pastoral or agricultural to increasingly industrial and urban economies, the growing concentration of people from place to place, as their

...ngements. Second, far from their ancestral homes—all these factors ...have tended to make the larger family of the past less meaningful as a ...kinship unit." Today, when the state has assumed full responsibility for ...the maintenance of law and order and for the protection of the life and ...property of its citizens, it no longer seems necessary to award higher ...rights of inheritance to those who traditionally had the duty of fighting ...for their own tribes (Indian sky called 'agnates'). On the contrary, ...equitable approach with the agnates under the Shia law, seems more ...consistent with the thinking and practices of the present day world, ...where the distinction based on the basis of gender are being increasingly ...discarded.

Secondly, the question of which method of distribution, can be considered universal, per stirpes or per capita? The answer to this question is difficult and dependent upon certain other factors. There is ...nothing wrong in dealing with the distribution of per capita. But, as there ...is a direct nexus of the adoption of the Doctrine of Representation for ...the purpose of determining the heirs entitled to succeed, in one form ...or other, the distribution of per stirpes has become more appropriate. ...The distribution of per stirpes must be adopted in case the Doctrine of ...Representation, for the purpose mentioned above, is recognised. ...Otherwise, it may be difficult to say which of the two methods of ...distribution is superior.

Thirdly, the question of which of the two interpretations given to the Quranic provisions governing awarding rights of inheritance to the ...daughter, sister and the mother, is in accordance with the spirit of the ...modern times (the literal or the narrow interpretation given by the ...Sunni schools awarding the inheritance rights to those females only ...who are expressly mentioned in Quran or the broader interpretation ...given by the Shia schools awarding rights of inheritance to remoter ...females on the analogy of sister and daughter)? Under the present day ...standards, the Shia interpretation appears to be closer to reality. When ...the sister is allowed to succeed with the brother, then, why should the ...brother's daughter not be allowed to succeed with the brother's son? It ...may not appear to be in accord with the spirit of reforms introduced by ...Islam in matters of inheritance to the females, that a female be excluded ...from inheritance when a male in the same line of descent or degree of ...relationship is allowed to succeed.

...ondly, the division of heirs into three classes and the detailed rules ...f succession for each class make the Sunni scheme more technical and ...complex when compared to the Shia scheme which has only two classes ...of heirs with simpler and briefer rules of succession governing each ...class. The division of heirs by consanguinity into three groups for the ...purpose of determining rules of exclusion from inheritance makes the ...distinction and distribution between Sharers and Residuaries less ...important. The main complexity in the Sunni scheme has been caused ...by the class of Distant Kindred because of the detailed rules that had to ...be provided for the succession of the various subclasses of Distant ...Kindred. The complexities are further aggravated by following ...Ibn-as Muhammad's method of distribution to the Distant Kindred. The ...omission of the class of Distant Kindred, under the Shia scheme, has ...resulted in making the scheme of inheritance simple and easily ...comprehensible.

Finally, however, the Shia reasoning behind exclusion of grandparents ...of the deceased in the presence of children or their descendants does ...not appear to be very convincing. If the grandchildren can enter into ...the shoes of the children in their default, why cannot the grandparents ...do the same in the absence of parents? From this point of view, the ...provision of the law allowing true grandparents to succeed in default of ...parents but in the presence of children or their descendants seems more ...convincing. But the question is whether the distinction between true ...and false grandparents, made by the Sunni law is relevant in the present ...times? The rationale behind this distinction is exactly the same as for ...the distinction between the agnates and the cognates. As maintained ...earlier, the distinction between agnates and cognates is not appropriate ...under contemporary conditions, therefore, the same can be said about ...the distinction between true and false grandparents.

From the above discussion, it can be safely concluded that the Shia ...scheme of inheritance, compared to the Sunni scheme, is much simpler ...and is in accord with the spirit of the contemporary world. But can the ...Shia scheme replace the Sunni scheme because it is simpler and more ...comprehensible? Although the benefits of adopting a simpler scheme ...cannot be denied, yet it may not be possible because the law in both ...cases is religion oriented. The two sects do not consider their schemes ...merely as scientific laws governing intestate succession, but hold them ...in great reverence because of their divine origin. Regardless of the ...merits of the Shia scheme, it is difficult, or even impossible, to make it

distinction. In this way, in default of the father or mother of the deceased, the grandfather or the grandmother can respectively succeed to their fixed share of 1/6 each. This means that, if the deceased is survived by his mother's father and father's father and the father is already dead, then the two grandparents should succeed to the fixed share of the father, that is 1/6, each getting 1/12. Similarly, the nearest grandmothers will take the fixed share of the predeceased mother. Of course, a mother's presence will be sufficient not only to disqualify all grandmothers connected to the deceased through the father, even if the mother is predeceased. However, the grandmother connected to the deceased through the mother, in this case, will be entitled to the share of the mother.

2 To make the law more scientific, it is necessary that any small exceptions to the general rules may be eliminated, if possible. One such exception is made by the Shia law in favour of a full uncle's son against a consanguine uncle. This is due to a historical reason—for establishing the claim of Ali over Abbas as successor to the Prophet. Since the matter goes to the root of the belief and principles of the Shia faith, the Shias may retain this exception only in the case of Ali and Abbas, but not make it a general rule to be applied in all such cases.

3 Similarly, it might be more equitable to adopt the Doctrine of 'Return' and 'Increase' as enunciated by the Sunni law. Whereas the Sunni law defines the two doctrines in general terms and without many exceptions, the Shia law makes so many exceptions to the doctrines that it really negates the rule, thus making the doctrines virtually ineffective.

However, even this solution seems unlikely to be adopted because of the following reasons:

1 In countries with a predominantly Sunni population, the Sunnis will not accept any ingredients of the Shia scheme.[36] Similarly, in Iran (having approximately a 90 per cent Shia population and only 10 per cent Sunnis) any inclusion of a provision of the Sunni scheme might be resented very strongly. However, the idea of integration may have some appeal or be of practical value in Iraq, where population is evenly divided between Shias and Sunnis. An attempt was made to unify the succession provisions in the

States of America cannot serve as a good guide for Muslim countries because of the following reasons:

1. In the United States, testamentary succession is much more common than intestate succession. Americans, with substantial assets, usually execute wills, making provisions for the disposition of their entire estate after their death. The laws in all the States give full recognition to the provisions laid down in validly executed wills; unless such provisions are illegal, unattainable or against the public policy. Thus, the law of intestate succession has become relatively unimportant.
2. Fifty different State jurisdictions, with their own succession and probate laws, lend further complications to the situation. Such factors make the law of intestate succession in the United States indefinite, because at times its provisions differ from State to State.

Compared to the United States, the law of succession in Germany and Switzerland may serve as a better model for countries which may be seeking to experiment with foreign laws of succession. This is because (a) the provisions regarding succession as laid down in Germany and the Swiss Civil Codes are very precise and definite; and (b) the law of succession in Turkey, since 1926, is based upon the Swiss Code.[38] Iraq experimented with the German law of succession in 1959, but the experiment lasted for four years only.[39]

However before discussing the merits and the demerits of the German and Swiss laws of succession as compared to the Islamic law of succession, the two schemes of inheritance are discussed below:

(a) The German Law of Intestate Succession:

The heirs of the intestate deceased are the surviving spouse and all his blood relations.[40] They are entitled to a fixed proportion of the estate, which is calculated according to the parental system. All the blood relations are divided into five parentals, given as follows:

First Parental—Descendants of the Deceased.

Second Parental—Parents and their descendants.

Third Parental—Grandparents and their descendants.

Fourth Parental—Great grandparents and their descendants.

f An adopted child is treated just like a legitimate child of the adopting parents. He, however, can be excluded from the right of succession while entering into the contract of adoption.

g An unborn heir, at the time of the death of the deceased, succeeds to his share upon its live birth. The distribution of the estate is postponed till its birth and a guardian is appointed by the court to protect the rights of the unborn child.

Regarding testamentary succession, the German law gives wide powers to all citizens to make wills. The testator may either make a holographic will, which requires no more than an undated but signed declaration in his own handwriting,[41] or a 'public testament', in which a judge or a notary records the written or oral declaration of the testator's last Will and Testament.[42] The testator can disinherit his nearest and dearest without cause and leave his estate to other persons or for other purposes.[43] Such a will is, however, of no effect if the testator's action can be characterized as contrary to his moral duty.[44] And in any case, certain disinherited heirs always have a claim *in personam* against the remaining heirs for half the amount to which they would have been entitled *in rem* in the case of intestacy.[45]

(b) The Swiss Law of Succession:

The heirs of the intestate deceased are the surviving spouse and all his blood relations. Their shares are also determined according to the parental system. All the blood relations are divided into three parentals given as below:

First Parental—Descendants of the deceased.

Second Parental—Parents and their descendants.

Third Parental—Grandparents and their descendants.

The general rules of succession and exclusion from succession, as laid down in the Swiss Civil Code, can be summed up as follows:[46]

a Among the parentals, the earlier exclude the later ones.

b Within each parental, the nearer in degree of relationship to the deceased exclude the more remote. However, the Swiss law accepts the doctrine of representation in its entirety.

c Within the same line of descent, males and females take equally.

d. The surviving spouse always succeeds to his/her share, which comes. When inheriting with the heir or heirs belonging to the first parental, the spouse is given the option to take either one-half of the estate or one-fourth in absolute ownership. While taking with heir or heirs of the second parental, the spouse gets one fourth in absolute ownership and three-fourth as life estate. With heirs of the third parental, the spouse takes one half as life estate. In default of all the three parentals, the spouse succeeds to the whole estate of the deceased as an absolute owner. The spouse is also allowed the option to take the rest of the property instead of his share in default of the surviving spouse and heirs belonging to the three parentals, the estate of the deceased escheats to the state.

e. The illegitimate child has the same right of inheritance from its mother as a legitimate child. From the father, the illegitimate child can only inherit in case the father acknowledges it as his child or by the judgement of the court. If the illegitimate as well as legitimate children, succeed together then their share, then an illegitimate child takes one-half as much as a legitimate child.

f. An adopted child has the same right of inheritance as a natural born child.

g. The unborn child inherits from the time of its conception. The statute guards the interest of the unborn child, but, where there is exclusive interest then a guardian is appointed by the court to safeguard the interest of the unborn child. The succession is however postponed to the time of its birth.

Under the law, a person can dispose of all his property to anyone he chooses, a valid will.

(c) Conclusion:

The study of German and Swiss laws of succession reveals that they are simple and precise. They claim details and are representative of the modern trend in planning, which, is based on equality of sexes and greater importance to the spouses. But, they are not without drawbacks.

The life estate, as recognized by the Swiss law, creates certain problems like the administration of life estates and the frustration of other heirs who are made to wait until the death of the spouse. Both laws of succession leave the parents of the deceased unprovided for in the presence of the descendants.

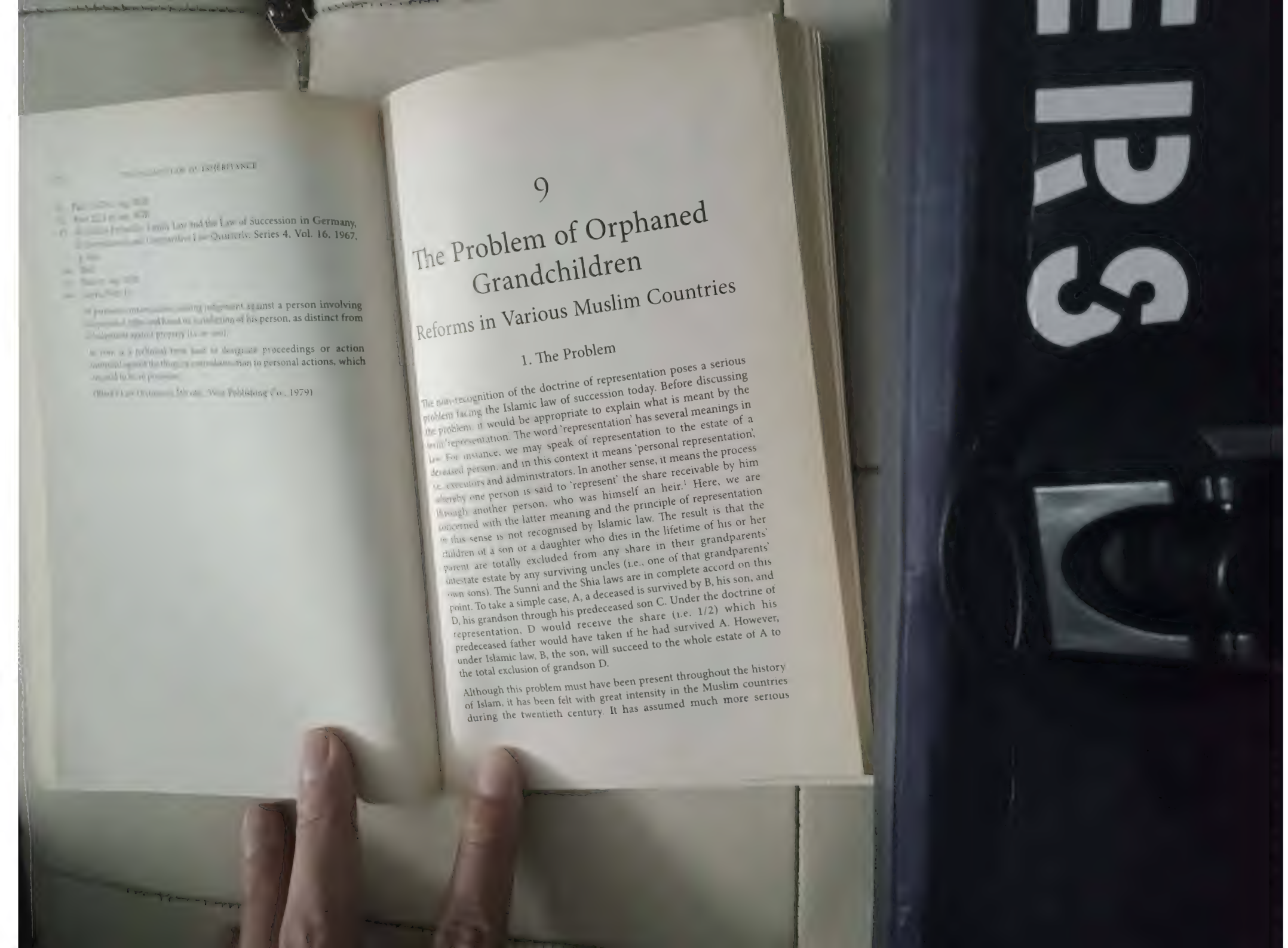
Anyhow, whatever the merits or demerits of these laws of succession, it is unlikely that they will be adopted by any Muslim country in the near future. The following reasons can be given in support of this conclusion:

1. There is no significant movement in Muslim countries towards the complete abandonment of the Islamic personal laws of inheritance. All that is sought is that certain problems and handicaps arising from them may be solved under the framework of Islamic law. Thus, the introduction of a foreign law of inheritance would not only be resented, but strongly opposed in Muslim countries, as it happened in Iraq. It is noticeable that the volume of litigation in the area of the law of succession is less than most of the other areas of law in the Muslim countries. This fact alone is sufficient to prove that Muslim countries are not having any difficulties with their law of succession.

2. The family structure in the Muslim countries is very different to that in Germany and Switzerland. The rationale behind giving a higher share to the spouse as compared to cousins, uncles, etc. is that the spouse is nearer to the deceased then cousins and uncles who scarcely know and rarely mourn the death of the deceased. This may be true in Germany, Switzerland and other countries of Europe and the United States, but it does not hold good in Muslim countries. Unlike Europe, the people in Muslim countries tend to associate frequently with their relatives and families and sometimes groups of families live together. These circumstances justify the distribution of the estate of the deceased even to remote blood relations.

3. In Muslim countries, the male is still the breadwinner, and most of the females stay at home. Under these circumstances, the rule of double the share to the male is understandable and acceptable. In Europe and the United States, there is a change, and women are taking an equal part in economic life. Thus, equal share to both the sexes might be more appropriate in those countries.

44. Asiatics (Marriage, Divorce and Succession) Ordinance, 1929, s.6(i).
45. L. Ostrorog, The Angoro Reform, pp. 85-86, 1927.
46. F.B. Tayyabji, *Muhammadan Law*, 3rd edn., 1940, p. 823, as quoted by K.P. Saksena, *Muslim Law* (4th Edition, 1963), p. 881. (A fourth Edition of Tayyabji's book has appeared, not edited by the author but by his son, who has curtailed the portion of the third edition from which the above quotation has been taken).
47. N.J. Coulson, *Succession in the Muslim Family*, Cambridge: Cambridge University Press, 1971, p. 133.
48. The Quran, *Surah An Nisa* 4:7 & 32.
49. F.B. Tayyabji, *Muhammadan Law*, 4th edn., Bombay: N.M. Tripathi, 1968, p. 894.
50. Ibid., p. 895.
51. Agha Sher Ali v Bai Kuisum Khanam, 1908 The Bombay Law Reporter (Vol. X) 717.
52. Ibid.
53. Supra, Note 19, p. 895.
54. The Quran, *Surah An Nisa* 4:11.
55. The Quran, *Surah An Nisa* 4:15.
56. Supra, Note 19, p. 895.
57. Ibid., p. 896.
58. A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd edn., London: Oxford University Press, 1964, p. 457.
59. Supra, Note 19, p. 896.
60. Ibid.
61. Ibid., p. 897.
62. Ibid.
63. Ibid.
64. In Afghanistan, tribal life is still of predominant importance. In Pakistan, there are tribes existing in the North Western parts of the country. These are the Pathan tribes. In Turkey, Iran and Iraq, there are Kurds leading a kind of tribal life. Similarly, in certain African countries with predominantly Muslim population (like Nigeria, Sudan etc.), the basis of the society is still tribal. Even, in these instances, the tribal life is different in character to the tribal life in Arabia, thirteen or fourteen hundred years ago.
65. Kemal A. Faruki, Orphaned Grandchildren in Islamic Succession Law, Islamic Studies, Vol. 4, 1965, pp. 253-274 on 254.
66. Like Pakistan, Afghanistan, Turkey with predominant Sunni population compared to Shia population.
67. Ismail I. Nasir, *The Islamic Law of Personal Status*, 2nd edn., London: Graham and Trotman, 1990, pp. 224-225.
68. Supra, Note 15, p. 91.
69. Supra, Note 2, p. 362.
70. Para 1924 et. seq. BGB.



9

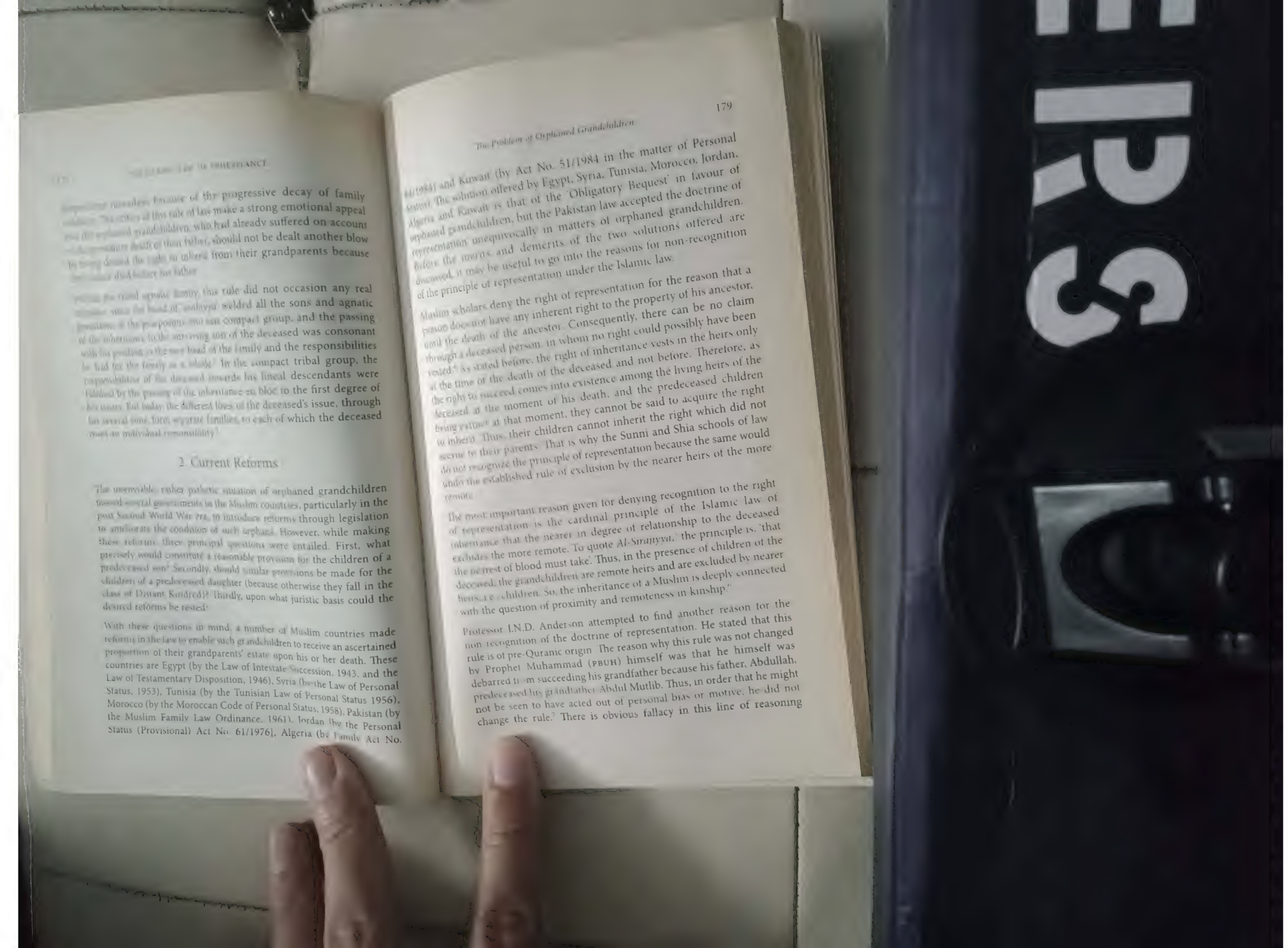
The Problem of Orphaned Grandchildren

Reforms in Various Muslim Countries

1. The Problem

The non-recognition of the doctrine of representation poses a serious problem facing the Islamic law of succession today. Before discussing the problem, it would be appropriate to explain what is meant by the term 'representation'. The word 'representation' has several meanings in law. For instance, we may speak of representation to the estate of a deceased person, and in this context it means 'personal representation', i.e. executors and administrators. In another sense, it means the process whereby one person is said to 'represent' the share receivable by him through another person, who was himself an heir.[1] Here, we are concerned with the latter meaning and the principle of representation in this sense is not recognised by Islamic law. The result is that the children of a son or a daughter who dies in the lifetime of his or her parent are totally excluded from any share in their grandparents' intestate estate by any surviving uncles (i.e., one of that grandparents' own sons). The Sunni and the Shia laws are in complete accord on this point. To take a simple case, A, a deceased is survived by B, his son, and D, his grandson through his predeceased son C. Under the doctrine of representation, D would receive the share (i.e. 1/2) which his predeceased father would have taken if he had survived A. However, under Islamic law, B, the son, will succeed to the whole estate of A to the total exclusion of grandson D.

Although this problem must have been present throughout the history of Islam, it has been felt with great intensity in the Muslim countries during the twentieth century. It has assumed much more serious



progressive decay of family

rule make a strong emotional appeal

already suffered on account

should not be dealt another blow

their grandparents because

this rule did not occasion any real

welded all the sons and agnatic

compact group, and the passing

deceased was consonant

the family and the responsibilities

tribal group, the

deceased inwards his lineal descendants were

passing of the inheritance en bloc to the first degree of

today, the different lives of the deceased's issue, through

several sons, form separate families, to each of which the deceased

individual responsibility.[5]

2. Current Reforms

unenviable, rather pathetic situation of orphaned grandchildren

governments in the Muslim countries, particularly in the

World War era, to introduce reforms through legislation

ameliorate the condition of such orphans. However, while making

reforms, three principal questions were entailed. First, what

would constitute a reasonable provision for the children of a

deceased son? Secondly, should similar provisions be made for the

of a predeceased daughter (because otherwise they fall in the

Distant Kindred)? Thirdly, upon what juristic basis could the

reforms be rested?

these questions in mind, a number of Muslim countries made

in the law to enable such grandchildren to receive an ascertained

their grandparents' estate upon his or her death. These

are Egypt (by the Law of Intestate Succession, 1943, and the

Testamentary Disposition, 1946), Syria (by the Law of Personal

1953), Tunisia (by the Tunisian Law of Personal Status 1956),

(by the Moroccan Code of Personal Status, 1958), Pakistan (by

Muslim Family Law Ordinance, 1961), Jordan (by the Personal

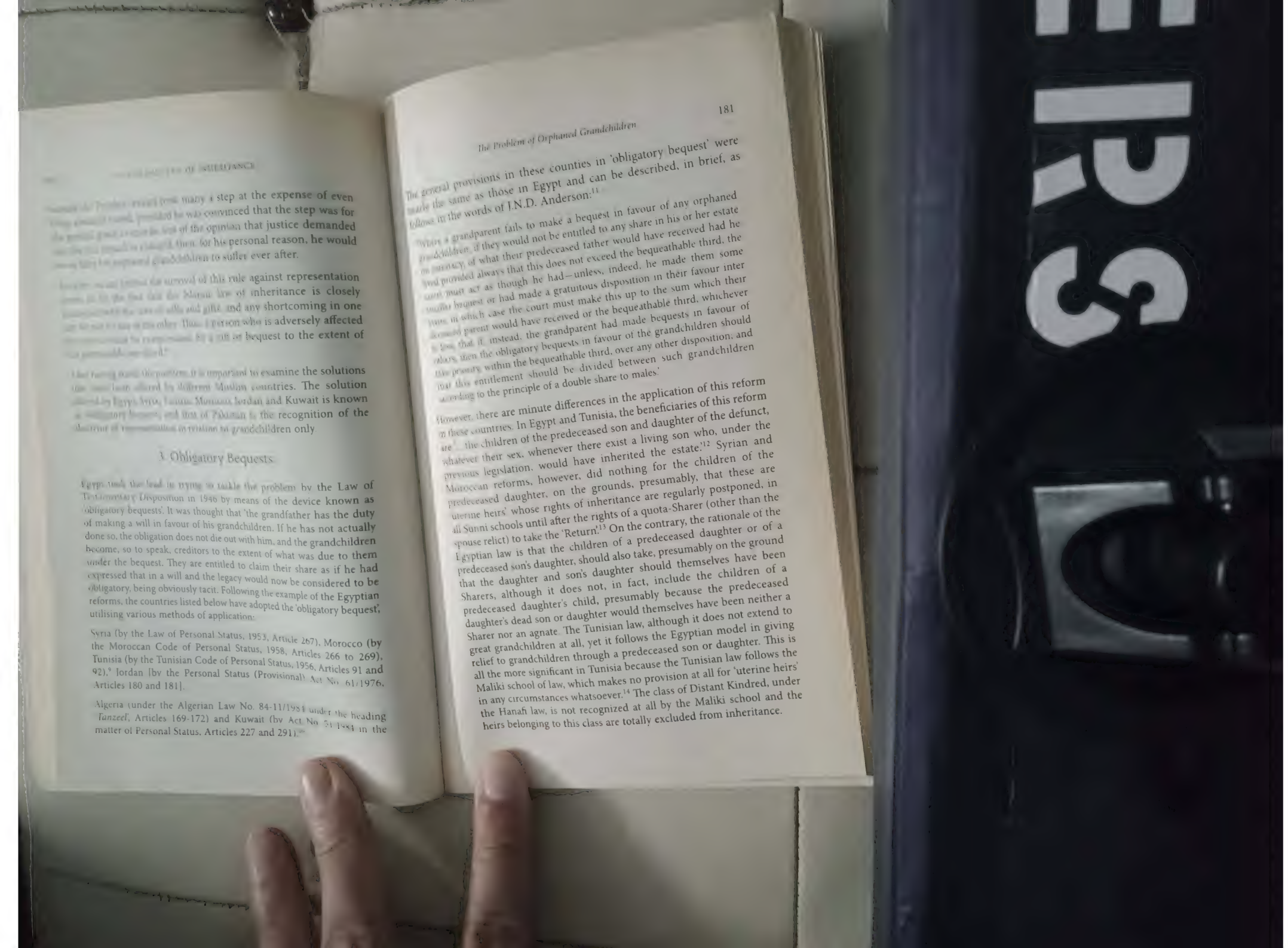
(Provisional) Act No. 61/1976], Algeria (by Family Act No.

84/1984) and Kuwait (by Act No. 51/1984 in the matter of Personal Status). The solution offered by Egypt, Syria, Tunisia, Morocco, Jordan, Algeria and Kuwait is that of the 'Obligatory Bequest' in favour of orphaned grandchildren, but the Pakistan law accepted the doctrine of representation unequivocally in matters of orphaned grandchildren. Before the merits and demerits of the two solutions offered are discussed, it may be useful to go into the reasons for non-recognition of the principle of representation under the Islamic law.

Muslim scholars deny the right of representation for the reason that a person does not have any inherent right to the property of his ancestor, until the death of the ancestor. Consequently, there can be no claim through a deceased person, in whom no right could possibly have been vested.[6] As stated before, the right of inheritance vests in the heirs only at the time of the death of the deceased and not before. Therefore, as the right to succeed comes into existence among the living heirs of the deceased at the moment of his death, and the predeceased children being extinct at that moment, they cannot be said to acquire the right to inherit. Thus, their children cannot inherit the right which did not accrue to their parents. That is why the Sunni and Shia schools of law do not recognize the principle of representation because the same would undo the established rule of exclusion by the nearer heirs of the more remote.

The most important reason given for denying recognition to the right of representation is the cardinal principle of the Islamic law of inheritance that the nearer in degree of relationship to the deceased excludes the more remote. To quote *Al-Sirajiyya*,' the principle is, 'that the nearest of blood must take'. Thus, in the presence of children of the deceased, the grandchildren are remote heirs and are excluded by nearer heirs, i.e. children. So, the inheritance of a Muslim is deeply connected with the question of proximity and remoteness in kinship."

Professor I.N.D. Anderson attempted to find another reason for the non recognition of the doctrine of representation. He stated that this rule is of pre-Quranic origin. The reason why this rule was not changed by Prophet Muhammad (PBUH) himself was that he himself was debarred from succeeding his grandfather because his father, Abdullah, predeceased his grandfather Abdul Mutlib. Thus, in order that he might not be seen to have acted out of personal bias or motive, he did not change the rule.[7] There is obvious fallacy in this line of reasoning



3. Obligatory Bequests

Egypt took the lead in trying to tackle the problem by the Law of Testamentary Disposition in 1946 by means of the device known as 'obligatory bequests'. It was thought that 'the grandfather has the duty of making a will in favour of his grandchildren. If he has not actually done so, the obligation does not die out with him, and the grandchildren become, so to speak, creditors to the extent of what was due to them under the bequest. They are entitled to claim their share as if he had expressed that in a will and the legacy would now be considered to be obligatory, being obviously tacit. Following the example of the Egyptian reforms, the countries listed below have adopted the 'obligatory bequest', utilising various methods of application:

Syria (by the Law of Personal Status, 1953, Article 267), Morocco (by the Moroccan Code of Personal Status, 1958, Articles 266 to 269), Tunisia (by the Tunisian Code of Personal Status, 1956, Articles 91 and 92),[9] Jordan [by the Personal Status (Provisional) Act No. 61/1976, Articles 180 and 181].

Algeria (under the Algerian Law No. 84-11/1984 under the heading *Tanzeel*', Articles 169-172) and Kuwait (by Act No. 51/1984 in the matter of Personal Status, Articles 227 and 291).[10]

The general provisions in these counties in 'obligatory bequest' were nearly the same as those in Egypt and can be described, in brief, as follows in the words of J.N.D. Anderson:[11]

'Where a grandparent fails to make a bequest in favour of any orphaned grandchildren, if they would not be entitled to any share in his or her estate on intestacy, of what their predeceased father would have received had he lived provided always that this does not exceed the bequeathable third, the court must act as though he had—unless, indeed, he made them some smaller bequest or had made a gratuitous disposition in their favour inter vivos, in which case the court must make this up to the sum which their deceased parent would have received or the bequeathable third, whichever is less, that is, instead, the grandparent had made bequests in favour of relatives, then the obligatory bequests in favour of the grandchildren should take priority within the bequeathable third, over any other disposition; and that this entitlement should be divided between such grandchildren according to the principle of a double share to males.'

However, there are minute differences in the application of this reform in these countries. In Egypt and Tunisia, the beneficiaries of this reform are '... the children of the predeceased son and daughter of the defunct, whatever their sex, whenever there exist a living son who, under the previous legislation, would have inherited the estate.'[12] Syrian and Moroccan reforms, however, did nothing for the children of the predeceased daughter, on the grounds, presumably, that these are uterine heirs' whose rights of inheritance are regularly postponed, in all Sunni schools until after the rights of a quota-Sharer (other than the spouse relict) to take the 'Return'.[13] On the contrary, the rationale of the Egyptian law is that the children of a predeceased daughter or of a predeceased son's daughter, should also take, presumably on the ground that the daughter and son's daughter should themselves have been Sharers, although it does not, in fact, include the children of a predeceased daughter's child, presumably because the predeceased daughter's dead son or daughter would themselves have been neither a Sharer nor an agnate. The Tunisian law, although it does not extend to great grandchildren at all, yet it follows the Egyptian model in giving relief to grandchildren through a predeceased son or daughter. This is all the more significant in Tunisia because the Tunisian law follows the Maliki school of law, which makes no provision at all for 'uterine heirs' in any circumstances whatsoever.[14] The class of Distant Kindred, under the Hanafi law, is not recognized at all by the Maliki school and the heirs belonging to this class are totally excluded from inheritance.

bequest to an heir." However, a small but respectable minority, including the Shafi'i, held that the verse was repealed only in respect of the relatives who actually receive a share of inheritance, and that it is still desirable at least for bequests to be made in favour of other close relatives.[17] The Ithna Ashari school alone permits legacies to an heir, regardless of whether the other heirs consent or not, provided such bequests do not exceed the bequeathable third, on the grounds that the earlier verse is not abrogated by the later verses and that the object of the earlier revelation was to enable a Muslim by means of legacies within the limit of the bequeathable one-third to meet special cases of hardship not provided adequately by inheritance alone. A few jurists, notably the prolific author, Ibne Hazm, a representative of the now extinct Zahiri school, went further and insisted that the Quranic verse implied a definite legal obligation to make bequests in favour of those close relatives who were not heirs, and that if the deceased had failed to do his duty to make this obligatory bequest, the court should make it for him.[18]

In any case, it remained permissible to make a bequest in favour of any relative precluded from inheriting who, according to Kemal A. Faruki,[17] would most probably be a distant relative.[18] He further states that the Islamic permission for legacies to distant relatives would seem to originate from other Quranic and Hadith material because *Surah Al Baqarah* 2:180, by linking 'relatives' with 'parents' would seem to be referring to close 'relatives'. He continued his criticism in the following words:[19]

> This verse begins ("It is prescribed for you...") and makes legacies morally obligatory at least, in relevant cases. But to make a morally desirable into a legally enforceable rule, and further to imply that a testator has made or should have made such a legacy as is contemplated in *Surah Al Baqarah* 2:180 make it all the more necessary that one should be clear about the class of beneficiaries referred to. The identical classes 'parent and near relatives' are in *Surah Al Baqarah* 2:180 and in *Surah An Nisa* 4:7 which strongly indicate that the same groups of relatives are intended in both cases. If, nevertheless, it is maintained that orphaned grandchildren are 'close' relatives not otherwise provided for, it constitutes an admission that the rules of inheritance as laid down in the fourth *Surah* so painstakingly precise for all the other immediate family members, contain an inexplicable omission with respect to orphaned grandchildren. On the other hand, if orphaned grandchildren

In the first place, the very idea of obligatory bequests is a contradiction in terms. How can a bequest be an obligatory one? The bequest, under all laws including the Islamic law, is a voluntary expression of the wishes of a testator. The substitution of the state's wishes over those of the testator will make a mockery of the very concept of wills.

Secondly, the obligatory bequest has introduced an entirely new element into the very principles of the Islamic law of succession, being neither a legacy nor an inheritance, neither testate nor intestate. It is uncertain as to how it should be understood. The idea is more like legal fiction whereby the objects not permitted by law were achieved while pretending at the same time that the law has remained unaltered. The very fact that this system has to use the principle of representation to ascertain whether a predeceased son or daughter would have received as an heir in the first place and then to ascertain what portion should be allotted to his or her orphaned child or children, would establish that an obligatory bequest is indeed a concealed form of inheritance.[21]

Thirdly, even if it is accepted that voluntary elements from bequests can be removed in the general interest, it becomes extremely important to base this alteration or substitution or presumption of the wishes of the deceased upon a consistent principle either of need or of relationship combined with need. Otherwise, the danger is that the system of obligatory bequests may become, in the course of time, a means whereby a Muslim is deprived of dealing with one-third of his estate in complete violation of the spirit of legacies. The test for a justifiable legacy, according to Mr Faruki, is primarily need and not the strength of blood relationship. He states, 'As long as bequests are voluntary dispositions the beneficiaries will naturally and justifiably vary from case to case and each case is fully capable of keeping within the true Islamic spirit of legacies. Thus where P dies at an advanced age leaving one living son A and a grandson B by another predeceased grandson C, the grandson being well over thirty at the time of P's death and already well provided for by his own father's estate, it may well be that P should provide instead by legacy for D, an infant or crippled grandnephew. For legacies, almost by definition in Islamic terms, are primarily for the needy rather than the closely related.'[22]

It is difficult to agree with Mr Faruki's critical reasoning. He assumed too many factors in his example and such instances are indeed rare. The life expectancy in most Muslim countries is rather low and only in a

are Muslim relatives, there is no sustainable juristic basis for confirming obligatory bequests to them alone. There may well be other orphaned children related to the deceased for other cases of need amongst his relatives not close enough in heirship as heirs, equally entitled to enjoy the benefits of any system of obligatory bequests that might be set upon on this basis.

However, it is difficult to agree with the criticism of Mr Faruki. To say that the bequest can only be made in favour of a distant relative does not sound very convincing. It would be more appropriate to state that a bequest can be made in favour of anybody, a stranger or a close or distant relative, provided he is not going to take part in the intestate succession as an heir. It would be futile to go into the nearness or proximity of relationship because the distinction on such basis would be open to question under the conditions prevailing in the modern day world. This, probably, is the reason why the proponents of the system of obligatory bequests avoid the question of whether the orphaned grandchildren are close or distant relatives of the praepositus. Again, in spite of the fact that Surah Al Baqarah 2:180 has been partially abrogated by the later verses (in Surah An Nisa) in regard to those relatives who were subsequently given a fixed share, still the verse makes it incumbent on a Muslim to make provision by will for any close relative who is not otherwise provided for. In this way, the inexplicable omission with regard to orphaned grandchildren, as alleged by Mr Faruki, can be met. But, this leads to a further question: for which of the close relatives should such an action be taken and to whom should such power of decision be given? Under the present circumstances, the state may be the most appropriate authority to make such a decision. Thus, the selection of orphaned grandchildren under the appropriate legislation as the only relatives in whose favour such action should be taken, and the details as to what they should be given represents a legitimate exercise of the State's discretion in accordance with public interest.[20]

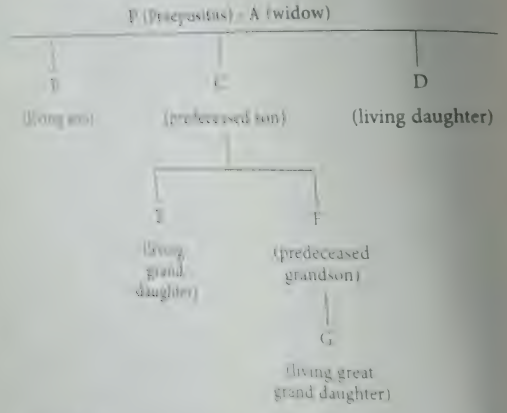
Despite good intentions on the part of the reformers to solve the problem without violating any specific provision of the law of inheritance, the device of 'obligatory bequests' is far from being perfect. Several weaknesses and loopholes in this solution are evident and, in spite of the cautiousness of reformers, it has led to several direct effects on the two schemes of inheritance, at times resulting in conflict and its manifestation. Some of the shortcomings in the reform of 'obligatory bequests' are discussed here:

needy grandchildren is also a charitable purpose, therefore, it should be given precedence over the other purposes on the basis of the principle that charity should begin at home.

Finally, Mr Faruki attacks the obligatory bequests because they are based on the assumption that the praepositus intended to provide for his orphaned grandchildren, and that this assumption can only survive in the absence of specific evidence to the contrary.[24] He goes on to say, 'but opposing the praepositus actually made provision by will for his orphaned grandchild to the extent of, say one-twelfth of his estate, then it is clearly absurd to assume that oversight has occurred. He remembered his orphaned grandchild and provided one-twelfth of his estate for him on what, in the particular circumstances of the case, appeared good and sufficient reasons. Yet the law under the system of obligatory bequests steps in after his death to alter his testamentary dispositions, raising the legacy to the grandchild to one-third of the estate for the equivalent of the predeceased father's share, whichever is less) at the expense of other legacies or the living son of the praepositus who may have been in greater need of the remaining 11/12th'. This criticism of Mr Faruki is, again, based upon too many presumptions. It is unlikely that somebody will make an inadequate will in favour of his orphaned grandchildren; either he would make no such will at all, or he would provide them adequately in the sense that they would receive what their predeceased parent would have received anyway. Besides, there is good reason to believe in the righteousness of the assumption that a praepositus would intend to provide for his orphaned grandchildren. It is commonly observed that living children often prevail upon their parent not to make a will in favour of the children of his predeceased child or to make (in case he is determined to do so) an inadequate bequest in their favour, so that their expected share in their parent's intestate estate might not be reduced. This kind of undue influence is very likely in the close family set ups in the Muslim countries where old parents are much too dependent (emotionally, if not financially) upon their children, and the latter can always stop the former from making a bequest which is detrimental to their own interests. Making such bequests obligatory can help avoid embarrassment to old grandparents and would also help fulfil their implied intention.

Sixthly, the institution of obligatory bequest leads to certain anomalies which are contrary to the traditional layouts and practices of the two schemes of inheritance. One such anomaly has been pointed out by

Shaykh Muhammad Abu Zahra.[27] Let us suppose that P is succeeded by his wife A, a son B, a daughter D and granddaughter E from a predeceased son C, while P's brother F (i.e. P's grandson) had also predeceased him, leaving behind a daughter G. This situation is better explained by the following diagram:



Here P's deceased son, if he had survived, would have been entitled to more than one-third, so that the obligatory bequests to his descendants will be reduced to the bequeathable third. This is quite straightforward. But this would itself be divided between the predeceased son's daughter E and granddaughter G in such a way that the latter would take two-thirds, namely the share that her father would have taken. This is radically different from the usual practice in Egypt (where the Sunni law of inheritance is followed) when a daughter is in competition with a son's daughter, with daughter taking 1/2 and son's daughter 1/6.

(b) The Difficulties and Complexities of Application:

Finally, there is the problem of how to apply this law. So far, three different methods have been suggested and applied. The first and the simplest method suggested is to distribute the estate as though the

predeceased son or daughter were still alive, and pass his or her share to his children. But this method may have a decisive and very questionable influence on the position of some of the other heirs. If, for example, a man is succeeded by four daughters, a full sister and the daughter of a predeceased son, the son, had he survived, would have reduced the share of the daughters by virtue of being a male, and excluded the sister. Again, if a woman is succeeded by her husband, mother, two uterine brothers and the son of a predeceased daughter, the deceased daughter had she survived, would have excluded the uterines.[26] Thus being so, it also means that the obligatory bequest is not really treated as a bequest at all.[27] And even where a man is succeeded by his widow, father and mother, son and daughter, and the daughter of a predeceased son, this method of calculation would throw the whole burden of the obligatory bequest on the son and daughter, not on the wife, father or mother, as Muhammad Abu Zahra points out.[28] This method has apparently been followed by some of the Egyptian courts, but their judgements have been quashed on appeal.[29] There is another difficulty with this method. The method is understandable so long as the predeceased child is succeeded by sons and daughters, because they are entitled to succeed to the full property of their parent. But, if the predeceased is succeeded by a daughter or daughters, then this method is silent on what should be done in such a case. Should the daughters get their proportionate fixed share in the property of their parent and the remaining revert to the parents, brothers and sisters of the predeceased? Or would the daughter or daughters be assigned the full share of their predeceased parent (which is against both schemes of inheritance)? Then again, the method is silent on the position of the spouse relict of the predeceased. Will the spouse relict take its share which it would have taken had its spouse not been predeceased? This method also overlooks the position of other fixed shares in the presence of the children of the predeceased. There is also no provision about the share of the surviving parent of the predeceased (if any) who would have been entitled to a fixed share at the death of his/her deceased child. Then, it is pointed out that this method of distribution results in favouring, in part, the immediate family of the deceased as against the claims of the tribal heirs.[30] For example, if a man is survived by a daughter, the son or daughter of a predeceased daughter and a brother's son, the daughter will take one-half, the grandchild one-third as legatee, and the brother's son one-sixth—instead of the one-half he would have taken under the law before the reforms or one-third in case the

the maximum 1/3 permitted under the provision of obligatory bequest. The rest of the estate will be divided between the widow A and the living son B of the deceased. The widow A will get her fixed share of 1/8 and B will take the residue 7/8. When these shares are reduced to 2/3 (the remaining estate of the deceased after having assigned 1/3 to D), the widows share will become 1/8 x 2/3 = 1/12 and B's share will be 7/8 x 2/3 = 7/12. Had C not been predeceased, the distribution would have been: A = 1/8, B = 7/16 and C = 7/16. From these results, it is clear that the application of Abu Zahra's method results in the reduction of the share of the widow. The living son, on the other hand, gains at the expense of his mother and the predeceased brother. Therefore, the application of this method also leads to certain undesirable results. It is said in the defence of Abu Zahra's method that had the deceased made a will upto 1/3 in favour of a stranger, the widow's share would have still been reduced the same way. But, it is difficult to agree with this explanation because, in the first place, situations like this will not lead to an unnecessary advantage to some of the Residuaries (like B in the given example) and secondly, the obligatory bequest (as discussed before) is, strictly speaking, not a bequest. It is a kind of concealed inheritance in favour of someone who has been accidently excluded due to the misfortune of untimely death. But, at the same time, one of the purposes of the reform is that the rights of inheritance of other heirs should remain unaltered and unaffected.

(c) A Proposed Method of Distribution:

So, after discussing the above three methods of distribution and pointing out their shortcomings, it can be concluded that none of them is foolproof and none of them can be used without violating certain express provisions, principles and purposes of the law of inheritance in certain respects. Therefore, it may be appropriate to consider yet another method of calculation.[4] By applying this method, the device of obligatory bequest can be used without contravening any provisions or principles of the law of inheritance.

This method involves two or three stages (as the case may be) of distribution before the shares of all claimants can finally be calculated. To begin with, it must be assumed that the predeceased child was alive at the time of its deceased parent. Thus, the first stage is to distribute the estate among the heirs of the deceased (including those children

example. In this case, we have to make a distribution at the second stage, because predeceased son S2 received more than the permissible 1/3. Therefore, the excess from the share of S2 would revert back to P once again. The difference in this case is:

7/20 - 1/3 = 21/60 - 20/60 = 1/60.

This 1/60 will again be redistributed among the heirs of P, but this time with S2 being assumed as extinct. Thus W is to get:

1/8 of 1/60 = 1/480,

S1 will get 2/3 of 7/8 of 1/60 = 7/720, and

D gets 1/3 of 7/8 of 1/60 = 7/1440.

Now we go to the third and the final stage of distribution; that is, distribution of the estate of S2. Assuming P having died before S2, the heirs of S2 would be his mother W, his wife SW, his daughters GD1 and GD2. In case the estate is still not exhausted, then his brother S1 and sister D would also be included as Residuaries. Thus his estate will first be divided amongst Sharers, that is, his mother W getting 1/6, his widow SW getting 1/8 and his two daughters GD1 and GD2 getting 2/3 collectively (1/3 each). After adding up their shares, still some residue remains which is

1 - (2/3 plus 1/8 plus 1/6) = 1 - 23/24 = 1/24.

The residue will be divided between his brother S1 taking 2/3 of 1/24 = 1/36 and his sister D taking 1/3 of 1/24 = 1/72. These shares are the fractions of the estate of S2 but he has taken only 1/3 of the estate of his father P. So, in order to reduce these fractions into the fractions of the overall estate of P and to make the shares of all heirs to add to unity, all these fractions have to be multiplied by 1/3. Therefore, W will get:

1/6 x 1/3 = 1/18, SW gets 1/8 x 1/3 = 1/24.

GD1 and GD2 each get

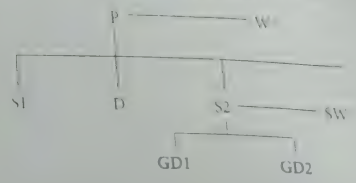
1/3 x 1/3 = 1/9, S1 gets 1/36 x 1/3 = 1/108

and D gets: 1/3 x 1/72 = 1/216

It can be noticed that W, S1 and D would take part in the distribution at all the three stages and thus their portions at each stage should be

after the predeceased. The second stage is only required when, after assigning the shares to the heirs of the deceased, it is found that the share of the predeceased child or children (as the case may be) has exceeded one-third (allowed under the obligatory bequest). So, at this stage the share exceeding one-third is taken away from the predeceased and reverts back to the deceased. This surplus is once again distributed among the heirs of the deceased but, on this occasion, the predeceased child or children would be assumed as extinct. This assumption is made because if the predeceased is assumed alive, then he would take part in the succession once again, and again his share would exceed one-third and the surplus would have to be distributed once again and this process would continue ad infinitum. In case the share of the predeceased child or children is not more than 1/3, then the second stage of distribution becomes unnecessary and we may proceed directly to the third stage. The third stage is the stage of distribution of the property of the predeceased child, which he/she acquired from the deceased parent. At this stage, the deceased would be assumed to have died before the predeceased and the distribution among the heirs of the predeceased is made according to the rules of succession. After this exercise is completed, it is possible that certain heirs have received shares at two or more stages of the distribution and these shares would have to be added up in order to determine their final shares.

This method of distribution can better be explained through an example. Suppose the deceased P is succeeded by his wife W, a son S1, a daughter D, and two granddaughters GD1 and GD2 of a predeceased son S2. The son S2, besides daughters, is also survived by his widow SW at the time of deceased's death. This can also be shown in a diagram as under:



In, following the method described above, a distribution of the estate is made at the first stage by assuming predeceased S2 alive. Thus, his widow W would get 1/8, sons S1 and S2 would each get 7/20, and daughter D would receive 7/40. Thus, the first stage of distribution is

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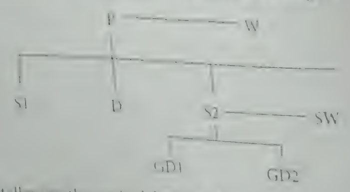

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$$1/6 \times 1/3 = 1/18, \text{ SW gets } 1/8 \times 1/3 = 1/24,$$

GD1 and GD2 each get:

$$1/3 \times 1/3 = 1/9, \text{ S1 gets } 1/36 \times 1/3 = 1/108$$

and D gets 1/3 x 1/72 = 1/216.

It can be noticed that W, S1 and D would take part in the distribution at all the three stages and thus their portions at each stage should be

...ssible to determine their overall share in the estate of P. Hence, the final distribution of the estate of P is as follows:

AV = 1/8 + 1/480 + 1/18 = 263/1440

SJ = 7/20 + 7/720 = 1/108 = 2391/6480

D = 7/40 = 7/1440 = 1/216 = 2393/12960

SW = 1/24

GD1 = 1/9

GD2 = 1/9

The sum of these shares is unity.

Unfortunately, this method of distribution is complex and lengthy. But, it does avoid the weaknesses attributed to the three methods mentioned earlier. If we have to find a remedy to the distress of the orphaned grandchildren within the framework of the Islamic law of inheritance and, at the same time, to leave the rights of inheritance of other heirs undisturbed, it may be difficult to find a simpler method of distribution of the estate of the deceased.

4. The Pakistani Reforms

The other solution (as previously mentioned) of recognition of the Doctrine of Representation in case of orphaned grandchildren has only been adopted by Pakistan under Section 4 of the Muslim Family Laws Ordinance (Ordinance VIII of 1961). This solution was, indeed, mooted in Lebanon for a number of years (but eventually abandoned, in so far as Muslims were concerned, because of the opposition which the proposal evoked), but Pakistan actually adopted it in 1961. Section 4 of the Ordinance reads as follows:

> In the event of the death of any son or daughter of the prapositus before the opening of Succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.'

This reform was advocated in the report of a Commission on Marriage and Family Law appointed in Pakistan in 1955 to advise upon possible

reform of the family law. It is stated in the report that the traditional doctrine recognizes the principle of representation in regard to ascendants, inasmuch as the grandfather takes the place of the father in the latter's absence and, therefore, the same principle ought to apply to the grandchild in the absence of the child, for 'the Islamic law of inheritance cannot be irrational and inequitable.'[25] The Commission also regarded the rule of no representation as the rule of pre-Islamic practice wrongly perpetuated by the medieval jurists and completely contradictory to the general spirit of the Quran—particularly those verses which show great concern for the protection and welfare of orphans. The Commission had framed a question regarding the problem of orphaned grandchildren in the following words:

> Is there any direction in the Holy Quran or any authoritative *Hadith* whereby the children of a predeceased son or daughter are excluded from inheriting property?

The Commission answered the question in the negative and recommended making a law that would provide for orphaned grandchildren. The report of the Commission was published in the Gazette of Pakistan Extraordinary, dated 20 June 1956.

(a) Its Merits and Demerits:

On the face of it, the solution appears to be undeniably straightforward and practical. In the words of Anderson, 'It represents a reproduction of what would have happened had the deceased parent survived till one minute after the demise of the grandparent concerned, instead of dying, perhaps, two minutes before.'[26]

The Islamic basis of the solution is explained by taking the case when a praepositus outlives all his children so that his grandchildren (agnatic under the Sunni law) succeed as heirs as a matter of right in the absence of sons or daughters of the praepositus. In such a situation, their claims are considered stronger than those of other relatives subject only to the same limitations in favour of fixed Quranic Sharers which operate to the reduction of the residual amount received by the children of the praepositus. Therefore, the grandchildren (only agnatic under the Sunni law) are recognized as possessing the right to inherit in the absence of their fathers or agnatic uncles, and the same rule has been extended in Pakistan even in cases where agnatic uncles and aunts are alive, provided the father is predeceased

It is further argued that there is no Quranic statement excluding the orphaned grandchildren. But, there is a tradition from the Prophet, which states: 'Pay the fixed shares of inheritance to persons entitled to them. What remains thereafter is for the nearest male person.'[37] 'Nearest' in this context means, of course, nearest to the praepositus. Kemal A. Faruki, who was a staunch supporter and advocate of the Pakistani reforms, tried to place an interpretation on the above mentioned tradition, which is untenable in the Pakistani reforms. According to him, 'it is reasonable to deduce that a grandchild cannot inherit from his grandfather so long as his own father is alive, the father being clearly nearer to the praepositus than his son is being a direct lineal descent. But this kind of reasoning has no necessary application to the uncle of the grandchild. From the grandfather P two lineal lines of descent take place represented by his two sons A and B. While it is correct to assert that the sons of A, namely A1, A2 and A3 are separated from their grandfather in the presence of A, it is erroneous to interpose B between P and his grandsons A1, A2 and A3 after the death of A. This is to confuse two entirely different lines of descent; the first from P to A to A1, A2 and A3 and second from P to B to his sons B1, B2 and B3. This distinction may not have been so important in times and circumstances where the male agnates lived together, the eldest male agnate being the head of the large family unit, charged with responsibilities not merely to his sons but also to his nephews and unmarried nieces, but this is no longer the case and the distinction between the two different lines of descent assumes far greater importance, and it is with regard to the changing structure of the family that the hadith injunction must be understood.'[38]

There is an inherent fallacy in the argument of Mr Faruki. Firstly, the idea of two separate lines of descent appears to be more fiction than reality. Secondly, the tradition is clear about the nearest male from the praepositus, who is a son or sons and not grandsons in the presence of son or sons. Thirdly, the successors are to be determined from the standpoint of the praepositus. The agnatic uncle may appear to be interposing between the praepositus and his grandchildren from the standpoint of grandchildren through a predeceased son; but he being the son of the praepositus, is the nearest heir as far as the praepositus is concerned.

Mr Faruki also argued that the principle of representation is not entirely foreign to Islamic succession rules. In the Hanafi school, it is used by

Imam Muhammad, disciple of Abu Hanifa, to ascertain the shares to Dhawi Kindred when the intermediate ancestors differ in gender, and in the Ithna Ashari School, it is used on an even wider scale to calculate the shares of each heir per stirpes.[39] Mr Faruki has again missed the point. In both the instances mentioned by him, the principle of representation is used to ascertain the quantum of the share of any given person on the footing that he or she is otherwise entitled to succeed to. The principle has never been applied to decide what persons are actually entitled to inherit.

Mr Faruki further contended that there are exceptions to the rule of 'the nearer in degree excludes the more remote', which already existed in the classical law of inheritance. He quotes three instances in support of his contention.[40] The first case is of a mother's mother not having been excluded by the father. Secondly, where the daughter A and her deceased brother's son B are the only heirs: A being nearer in degree, fails to exclude B and each of them would take one-half. This failure to exclude applies even if it is the son's daughter or the son's son or the son's son's daughter and he or she continues to inherit notwithstanding the presence of the daughter of the praepositus, who is many times nearer in degree. A third case is the failure of a full sister to exclude a uterine sister. Moreover, even the mother does not exclude uterine brothers and sisters who are connected to the deceased through their mother only. On the basis of these instances, Mr Faruki goes on to argue that if the rule of the nearer in degree excluding the more remote is powerless to exclude the mother's mother, the brother's son and uterine sister; how much more powerful should be the claim by right of an orphaned grandchild when he is related on the male side and is in the direct lineal order and a descendant of a praepositus.[41]

These contentions of Mr Faruki may sound convincing on the face of it but they are based on certain misconceptions. The cases cited (to which numerous others could be added, for example, the fact that a full sister does not exclude a consanguine brother's agnatic grandson), have nothing to do with the rule of degree as understood by traditional law. Then it operates, systematically and without exceptions, as the rule that a male agnate excludes more remote agnatic relatives of the same class. Furthermore, in all the cases cited above by Mr Faruki, the exceptions have been made in the cases of Sharers and not in the cases of Residuaries, like grandsons, brothers etc. The father and mother have been assigned fixed shares by the Quran and, in their absence, their

...sisters accordingly take their shares provided they are not connected to the deceased through a living parent. Thus, the father does exclude the sister's mother, if not the mother's mother. The daughter or daughters, in the absence of a son, have been given fixed share in the estate of their parents and this share cannot be increased. Therefore, the remaining portion has got to go to some one, even if he is more distant than the daughter or daughters. Similarly, the uterine brothers and sisters have been given fixed shares under the Quranic injunction. Nevertheless, this explanation holds to certain questions. Firstly, whether exceptions made specifically by the Quran can be used as the basis for making some more exceptions, and secondly, whether such an exception can be made in the cases where the nearer relatives are entitled to take the whole estate.

However, in spite of the justifications mentioned above for the Pakistani reforms, the demerits and shortcomings of the solution cannot be overlooked. This solution has been attacked by the critics from different angles and some of these criticisms are discussed below.

Firstly, it is contended that as the predeceased children of a praepositus could not inherit anything from their parent, then how can their sons and daughters inherit the quantum of their shares, which never accrued to them in the first place. The praepositus, in his lifetime, was the sole owner and proprietor of his properties and right to inherit his properties could only mature on his death and not before. Therefore, the orphaned grandchildren could not, in principle, inherit the portion which their parent could not because he/she died before the opening of succession.

Secondly, there is an argument advanced by the exponent of the Pakistani reforms that if the grandfather is entitled to inherit from the deceased grandson the share of his predeceased father, why should the grandson not also be entitled to inherit from the deceased grandfather the share of his predeceased father, on the same principle, even though other son or sons of the deceased grandfather be living. This argument is misconceived and the reason is not far to seek. The father's father would inherit from the deceased grandson whose father is dead. He does not inherit in the presence of the father. However, a man has only one father, but he may have more than one son. Therefore, the same logic may not apply in the case of the grandson as it does in that of the grandfather. So, when a son predeceases the praepositus, his share

...ich he would have received, if alive, goes to the surviving sons and daughters of the praepositus, instead of going to his own sons or daughters who are one degree more remote to the praepositus. If there were no son or sons of the praepositus living, then the inheritance would have devolved on the son's son as a Residuary. Similarly, if a man could have more than one father, then the share of his predeceased father, instead of going to the grandfather direct would have been distributed among the other surviving fathers.[42]

Thirdly, if the doctrine of representation is, by compulsion of law, applied in the case of the children of a predeceased son or a predeceased daughter, then why should it not be applied to other cases, too? One instance can be that of the spouse. Suppose A had two wives, B and C, of whom C predeceased A. A, at the time of his death, leaves behind wife B and one son D and one daughter E by her, and one son F and one daughter G by the predeceased wife C. According to Islamic law of inheritance, the share of the predeceased wife is merged into the estate of the deceased and the surviving heirs receive the following shares:

B = 1/8
D = 7/24
E = 7/48
F = 7/24
G = 7/48

In this case, D and E have an additional chance of inheriting the share of their mother in the long run, provided they survive her. So, the question as to why should the children of the predeceased wife not be accommodated and the share of their predeceased mother, which she would have received had she survived her husband, be passed on to them on the principle of representation. Similarly, why should the orphaned children of predeceased brothers and sisters be excluded from the inheritance that the predeceased brothers and sisters would have been entitled to? The same can be said about the orphaned children of paternal uncles and so on. If the principle of representation has to be accepted in one case, then it should be accepted in all the cases wherever it can be applied.

Fourthly, unqualified recognition of the doctrine of representation under the Islamic law may lead to certain anomalies. Let us suppose P has two children, a son A and a daughter B, and that B, who herself has

a daughter C, predeceased P. If there are no other claimants, the Pakistani law would award C the entire share of her mother, namely, one-third of the net estate. On the contrary, if had she survived, would have taken one-third of her parent's estate and her daughter C would not have been entitled to more than half of this, and the other half would have gone to her uncle A as the nearest agnate.[43] Kemal A. Faruki tried to justify this result by arguing that the theory behind the 1961 Pakistani law is that from the moment of P's death, her daughter C (in the given example) assume her position and the right.[44] This explanation is repugnant to the genesis basis of inheritance law in Islam wherein no rights accrue before the death of a praepositus.

Fifthly, the Ordinance of 1961, in invoking the principle of representation in the case of the daughter's children, converts the Distant Kindred (ie, the children of daughters are all Distant Kindred) into Sharers. This clearly contravenes the principle of the Sunni law of inheritance. In case the predeceased daughter is presumed to be alive at the death of the praepositus for legalizing the inheritance of the children of the daughter, then the lapsed rights of other excluded heirs will automatically and simultaneously revive on the principle of representation.[45] This situation can better be explained by an example. Suppose a praepositus P dies leaving a wife W, a daughter D, a grand daughter GD by a predeceased daughter F and a son S. Before the Ordinance, the distribution of the estate would have been restricted to W, D and S. If the predeceased daughter F is brought to life, as a supposition, to give her share per stirpes to her daughter, then the right of other legal heirs like her husband, mother W, brother S and sister D which, due to her dying before the praepositus, merged in the general pool, will automatically be revived. It will be inequitable to exclude all other legal heirs in order to satisfy a particular heir or set of heirs.

Finally, the most common objection to this solution is that it radically upsets the whole structure of the Islamic law of inheritance. By the application of the reform, the conventional distribution of the estate, under the Islamic law, gets into a new and rather different perspective. Anderson gives three examples to explain this situation.[46] First, let us suppose that P has two children, a daughter A and a son B, and that B predeceased his parent leaving a daughter C. If no other relatives are involved, the Pakistani law will result in the son's daughter C taking 2/3 of the estate, as the share which her deceased father would have taken, and the daughter A taking one-third. The usual rules under the Sunni

law would have initially allowed one-half to the daughter and one-sixth to the son's daughter, and would then have given them (after the application of the Doctrine of Return) three quarters and one-quarter respectively. It is needless to say here that the application of the reform of 1961 results into C receiving higher quantum of her grandfather's estate than she would have got had her father outlived his father (then she would have received just one-half of her father's estate, that is 2/3 x 1/3 = 1/3). Secondly, let us suppose that P dies survived by a daughter of a predeceased son and a full brother. In this case the Pakistani law would enable the granddaughter completely to exclude the brother, in the same way as her deceased father would have done; whereas the Sunni law would have given her one-half and would have left the other half to the brother, as would, indeed, have been the case had the deceased been survived by a brother together with his own daughter. Thirdly, let us suppose that P has a son A and a daughter B, and both of them die in his lifetime, the son leaving a daughter C and the daughter leaving a son D. In this case, the Pakistani law would allot two-thirds of the estate to the granddaughter C and one-third to the grandson D, as representing in each case their deceased parents, whereas the Sunni law would have given the whole estate to the son's daughter C as a Sharer and the remaining 1/2 by the principle of return to the total exclusion of the daughter's son, being a Distant Kindred.

The idea behind the reform was to provide the orphaned grandchildren with the rights they had lost because of their parent dying before their grandparent. It was never the purpose of the reform that the orphaned grandchildren should get an advantage out of their parent being predeceased and particularly when this advantage is being gained at the expense of other heirs. This viewpoint has finally prevailed with courts in Pakistan. Initially, the Peshawar High Court held in 1975 that by adopting the principle of per stirpes distribution of inheritance, it was meant to keep intact the share of predeceased son or daughter to be inherited by his/her son or daughter. Thus, the heirs of the predeceased would inherit from praepositus what their predecessor-in-interest would have inherited.[47] The Lahore High Court, in a later case, differed with the viewpoint of the Peshawar High Court and held that Section 4 of the Muslim Family Law Ordinance, 1961 never intended to give greater benefit to the grandchild of a predeceased parent than would have been his due, if the parent was alive. The starting point is that

be distributed among his or their heirs. This can be explained by an example. Suppose the praepositus P has two children, a son A and a daughter B, and that B, who herself has a daughter C, predeceased P. In this case the estate of P will first be divided among the children A and B (B being assumed alive at the death of P). Thus, A will get 2/3 and B will get 1/3. At the second stage, the estate of B will be distributed amongst her heirs. As the only heirs of B are her daughter C and her brother A, C shall take 1/2 of her mother's estate as Sharer, and A, her brother, will take the remaining 1/2 as Residuary. In order to reduce these shares in terms of fractions of the total estate of P, the granddaughter C will get 1/2 x 1/3 = 1/6 and the son will receive 1/2 x 1/3 = 1/6 plus 2/3 of his own thus making his share of the estate 1/6 + 4/6 = 5/6. The advantage of using this method of distribution is that it avoids all loopholes that occur in the law of inheritance by the blind acceptance of the doctrine of representation in the matter of orphaned grandchildren. The orphaned grandchildren are provided for by the share they would have received had their parent outlived his or her parent; but, at the same time, the orphaned grandchildren would not be given any advantage of their parent being predeceased at the cost of other rightful heirs of the predeceased like parents, spouse relict, or brothers and sisters etc. It can be stated with satisfaction that the courts in Pakistan, as stated above, have interpreted Section 4 of the Muslim Family Law Ordinance in this very manner.

In order to keep this exception just an exception, it may also be suggested that the doctrine of representation should only be applied to those orphaned grandchildren when they are otherwise totally excluded from inheriting any portion of the estate of their grandparent. In case the grandchildren are entitled to succeed to any portion of the estate of their grandparent under the classical law, then the application of the doctrine of representation is unnecessary and uncalled for and would have the effect of converting the exception into a rule. In the first two examples given by Anderson, the granddaughter C in the first example and the daughter of a predeceased son in the second example were heirs in their own right and eligible to a portion of the estate of their grandfather. The application of the doctrine of representation in such cases in order to increase their quantum of share would be unnecessary. Therefore, it can be suggested that, first of all, it should be determined whether the orphaned grandchildren are eligible to inherit in their own right, and in case they are so eligible, then the distribution should be

customarily the obligatory of the praepositus is deemed to be alive for the purpose of succession at the time of the death of the praepositus, and the succession of the grandchild is to be calculated again notionally as if the parent of the grandchild had died after the death of the original praepositus.[48] Thus, the Lahore High Court gave 1/2 share to the only daughter of the predeceased son as share and the remaining 1/2 falling to the predeceased reverted to the nearest male agnate, full paternal uncle's son in this case. On appeal, the Supreme Court of Pakistan upheld the view of the Lahore High Court and rejected the contention that the daughter of the predeceased would inherit the entire share of her father being the sole surviving child, as against the principle of Muslim law of inheritance she would get whatever she would be entitled to receive on the death of her father. The intention of Section 4 of the Ordinance, the Supreme Court observed, is to safeguard the interest of the children of a predeceased son or daughter and not to deprive the other heirs of the praepositus of their due.[49]

From the above discussion, it is clear that the Pakistani reform of unqualified recognition of the doctrine of representation in the matter of orphaned grandchildren is not without defects and shortcomings. It is not only contrary to the principle of 'nearer in degree excluding the more remote', but also upsets the whole structure of the Islamic law of inheritance (as is clear from the examples mentioned by Anderson). In case the reform is considered to be an exception to the principle of 'nearer in degree excluding the more remote' because of the plight of the orphaned children, it is still essential to discover a method whereby the exception does not upset the entire structure of the law of inheritance and also the exception remains an exception rather than become a rule. Certain suggestions can be considered in this regard.

(b) A Suggested Solution:

In order to save the structure of the law of inheritance, one suggestion could be that the method of distribution, which is suggested above for the obligatory bequests, be followed. In this case, the distribution will only have to be made at two stages instead of three, as it could be in the case of the obligatory bequest. The first stage is that the predeceased child or children of the praepositus be assumed alive at the time of the death of the praepositus and the distribution be made accordingly. At the second stage, the estate of the predeceased child or children would

...under without applying the doctrine of representation. But, in case they are not so eligible, then only the doctrine of representation be applied, so as to give the orphaned grandchildren the portion they would have been entitled to, had their parent not been predeceased. This proposition has been upheld by the Azad High Court holding that the Muslim Family Laws Ordinance would be applicable only in those cases where the sons and the daughters of a predeceased son or daughter are sought to be excluded on account of existence of other heirs of the same category to which the predeceased son or daughter belonged. When the grandson and granddaughter from a predeceased child are otherwise entitled to inheritance under the normal law of Shariah, they would take their shares accordingly. The court has also relied on the report of the Marriage and Family Commission and observed that the Commission was concerned only with those cases in which lineal descendants of a predeceased son or daughter were prevented from taking a share in the properties of their grandfather by way of inheritance due to the existence of other heirs of the same class to which the predeceased son or daughter belonged."

It has also been suggested that the reforms in the matter of orphaned grandchildren should be restricted to the children of the predeceased son only. It is argued that their case is legally stronger as they are the agnates of the deceased but the children of the predeceased daughter are neither legally on the same footing (being cognates and Distant Kindred) as the children of the son nor on any sentimental grounds. The predeceased daughters' children are not absolutely helpless as they have the right to inherit from their own father's side. This was probably the rationale behind the Syrian and the Moroccan reforms which did nothing to relieve the distress of the children of a predeceased daughter. This kind of reasoning may hold good in case the orphaned grandchildren are considered to be just grandchildren, but the argument loses its force when such orphaned grandchildren are regarded as the representatives of their parents; because their parents have themselves been Sharers or Residuaries anyway.

(c) The Challenge to the Validity of Pakistani Reforms:

On the constitution of *Shariat* benches in the High Courts in Pakistan in 1979, Section 4 of the Muslim Family Law Ordinance was challenged as un-Islamic. The *Shariat* Bench of the Peshawar High Court held

Section 4 as repugnant to the injunctions of Islam and declared that it should be repealed." This conclusion was arrived at after a detailed judgement based upon the original text of the Quran and *Sunnah* and other sources of authority. The Court held that since the Quran speaks of the shares of *Rijal* (men) and *Nisaa'* (women), therefore, it goes without saying that *Rijal* and *Nisaa'* cannot be but persons living at the time when succession opens. If the intention was to give something to *Mytis* (the dead), the Court reasoned, the words *Rijal* and *Nisaa'* would not have occurred. However, the Peshawar High Court rejected recourse to compulsory will (the same thing as obligatory bequest) and has remitted to suggest and recommend legislation to relieve distress of the son/daughter of a predeceased son. The proposal of the Court was made in the following words:

> We should rather like to commend persuasion and suggest that a predeceased [child's] son may himself or through his next friend move the District Judge within the local limits the property or most of the property is situated (of course, during the lifetime of his grandfather) that he should be advised to make a will which should ensure to him what he would have got as an heir to his father had his father not died during the lifetime of his own father. The intervention of the District Judge would incidentally remind the grandfather of his duty and give relief to a son/daughter of a predeceased son in most of the cases. In case, however, the grandfather refuses and District Judge feels that due to minority or for other reasons such a son/daughter will require maintenance, it should be possible for the State to arrange accordingly."

No doubt the striking down of the Section 4 being repugnant to injunctions of Islam was based on sound reasoning, but the solution recommended, with due respect to the learned judges, leaves much to be desired. In the first place, this proposal was vague and did not lay down definite guidelines for the District Judge regarding the extent or quantum of property for which he might persuade the grandfather to make the will. Secondly, this solution was not flexible enough to allow the grandfather to vary the will according to the circumstances of the family. Thirdly, this solution involved the interference of the courts in a matter which Islam has left to the option and conscience of the grandfather. Fourthly, legislating such a solution could lead to tensions and frictions within the family, which would not be desirable. It is not pleasant for grandsons or granddaughters (possibly minors), by themselves or on prompting by others, to take their grandfathers to court to convince them to execute wills in their favour. The orphaned

5. The Proposed Method of Calculation of Shares

Despite the shortcomings of the solution attempted, the gravity of the problem cannot be ignored or overlooked. But, the most difficult question is how the problem could be solved without at the same time violating the spirit, the structure and scheme of the Islamic law of inheritance? The greatest point in favour of the 'obligatory bequest' is that it is a remedy provided for the problem within the framework of the system. This device does not in any way affect the structure of the Islamic law of intestate succession, which, if properly applied, leaves it completely untouched, while making provision for the orphaned grandchildren. Its weakness lies in the fact that it makes a moral duty legally binding and obligatory. It also makes the distribution of the estate complicated and cumbersome.

The solution offered by the Pakistani Ordinance of 1961 is simpler and straightforward, but it is of foreign import and upsets the very structure and scheme of the Islamic law of inheritance. The solution introduces most radical changes in the Islamic law of inheritance and gives priority to the immediate family as against the traditional heirs or agnates. For example, the child of a predeceased daughter would take half the grandparent's estate as against even the full brother, while the daughter of a predeceased son would totally exclude such a brother, instead of sharing the estate with him.[73] This may, indeed, be regarded as a gain, but a gain achieved at the cost of a considerable number of anomalies; for the brother who would be excluded from such an estate by the granddaughter of the deceased through a predeceased son would not be excluded by the deceased person's own daughter.[74]

However, though any one of the two solutions may be adopted, the anomalies arising because of them have got to be taken care of. The anomalies exist, because the methods of distribution used or suggested so far are deficient (as have been pointed out earlier in this chapter). However, the anomalies in the distribution can be avoided by using the methods of distribution, suggested above, in either of the two reforms. These methods, though complex and detailed, lead to the same results as would have been achieved had the parent of the orphans not died before his parent. The other methods, at times, lead to altogether different results

a. By the first method, as followed by Egyptian Courts, the widow W's share remains unaffected, 7/16 goes to S1 and the grandson GS by receiving 7/16 would receive an amount in excess of the bequeathable one-third, thus violating the provision of the system of obligatory bequest.

b. By the second method, as recommended by the Mufti of Egypt, W's share would be reduced from 1/8 to 1/15 while S1 and GS receive 7/15 each. Thus not only would W's share be reduced to nearly half, but GS would receive an amount in excess of the bequeathable third in contravention of the law of 'obligatory bequest'.

c. By the third method, as suggested by Abu Zahra, GS would receive the maximum 1/3 permitted by the law of obligatory bequest, but W's share would be reduced from 1/8 to 1/12, and S1 would receive the residue of 7/12. In other words, S1's share has actually increased by one-third through the death of S2, while W's Quranic share has dropped by one-third.

However, in order to avoid such results, the distribution will have to be made at three stages in this case. At the first stage, the distribution of the estate of P shall be made while assuming S2 alive at the time of death of P. Thus, at this stage, W would get her fixed share of 1/8 and the two sons S1 and S2 would receive 7/16 each. As the share of S2 is in excess of 1/3, his share will be reduced to 1/3, and the excess be redistributed among W and S1 as heirs of P at the second stage, while assuming S2 as predeceased this time. The excess will be 7/16 - 1/3 = 5/48, and will be distributed between W, getting 1/8 of it, and S1 receiving the residue 7/8th of it. Thus, W will get 1/8 x 5/48 = 5/384 and S1 getting 7/8 x 5/48 = 35/384. Now, we move to third stage of distribution. At this stage, S2's share of 1/3 can be distributed among his heirs assuming his father P to be predeceased. Thus S2's heirs will be his mother W and son GS. W will take 1/6 of his estate that is, 1/6 x 1/3 = 1/18 and GS will take the residue 5/6 of his father's estate, that is, 5/6 x 1/3 = 5/18. Thus, the final distribution of P's estate will be W = 1/8 + 5/384 = 223/1152, S1 = 7/16 + 35/384 = 203/384, and GS = 5/18.

This method, though lengthy and complex, leads to the result that the orphaned grandchildren are provided for within the bequeathable third, without, at the same time, violating the right of the other heirs.

4 The device of 'obligatory bequest' does not upset the structure of the Islamic law of succession and the rights of other heirs remain more or less unaffected. The Pakistani reform not only upsets the structure of Islamic law of inheritance but also adversely affects the rights of other heirs.

5 According to Anderson, while the Pakistani reform protects the interests of orphaned grandchildren, it makes havoc of the Islamic law of intestate succession in a number of different respects. The device of 'obligatory bequests' has the virtue of protecting the interests of orphaned grandchildren very adequately, in most cases at least, while leaving the structure of the Islamic law of intestate wholly unaffected.[55]

6 The two reforms are essentially the same. The reform of 'obligatory bequest' also recognizes the principle of representation so long as the share of the predeceased child does not exceed one-third. This limited recognition of the doctrine of representation is certainly preferable because it does not violate the limit of one-third as prescribed by Islamic law for wills.

Notes

1. [illegible] Law, p. [illegible]
2. [illegible] in the Muslim Family, Cambridge, Cambridge University Press, 1971, pp. [illegible]
3. Ibid., p. 144
4. William H. Macnaghten, Preliminary Remarks, VIII, in his *Principles and Precedents of Mohammedan Law*, p. 1825 quoted by A.A.A. Fyzee, in *Outlines of Muhammadan Law*, 3rd edn., 1964, p. 385
5. [illegible] London: Premier Book House, 1959, p. 27.
6. [illegible], The Problem of Representation in the Muslim Law of Inheritance, in Islamic Studies, Vol. 3, 1964, pp. 375-391 on [illegible]
7. Supra, Note 1, p. 136.
8. Ibid
9. [illegible] Personal Status and Social Evolution in [illegible] Modification to Succession rights and to [illegible] Syria, Morocco and Egypt, in Islamic Review, Vol. 54, Nov. 1966, pp. 11-15 on 13
10. [illegible] *Personal Status*; 2nd edn., London, [illegible] pp. 224-225
11. J.N.D. Anderson, [illegible] Reforms in Islamic Law of Inheritance, in International and Comparative Law, Quarterly, Series 4, Vol. 14, 1965, pp. [illegible]
12. [illegible] the father and grandfather in fact died at the same time, [illegible] the grandchildren would be excluded from any right of inheritance.
13. Supra, Note 8, p. [illegible]
14. Supra, Note 11, p. [illegible]
15. Supra, Note 2, pp. 145-146.
16. Ibid
17. Kemal A. Faruki had been an advisor to the Central Institute of Islamic Research, Karachi and was the author of an authentic book on Islamic Jurisprudence.
18. Kemal A. Faruki, Orphaned Grandchildren in Islamic Succession Law, in Islamic Studies, Vol. 4, 1965, pp. 253-274 on 258
19. Ibid., pp. 258-259
20. Supra, Note 11, pp. 359-360
21. Supra, Note 18, p. 262
22. Ibid., p. 259
23. *Zakat* has been defined in the *Hedaya* as an Ordinance of God, incumbent upon every person who is free, sane, adult and a Mussalman (i.e. Muslim), provided he be possessed, in full propriety, of such estate or effects as are termed in the language of the law as *Nisab* (i.e. a person of means), and

that he has been in possession of the same for the space of one complete year. The reason of this obligation is found in the very words of Allah who has ordained it in the Quran, saying 'Bestow *Zakat*', *The Hedaya* (Guide), translated by Charles Hamilton (Second Edition, reprint 1963) p. 1.

24. Supra, Note 18, p. 261.
25. Shaikh Muhammad Abu Zahra, *Ahkam-ul-tarikat wo'l-mowarith*, p. 284 as quoted by J.N.D. Anderson, Supra, Note 11, p. 360.
26. Supra, Note 11, p. 360.
27. Ibid
28. Supra, Note 25, p. 360.
29. Ibid
30. Supra, Note 11, p. 161.
31. Ibid
32. Supra, Note 25, p. 361.
33. Ibid
34. The present writer proposes this method of calculating the entitlements of the heirs in the matter of 'obligatory bequest'.
35. Supra, Note 2, p. 150.
36. Supra, Note 11, p. 361.
37. This tradition or *Hadith* is found in both the collections of Muslim and Bukhari on the authority of Ibn 'Abbas.
38. Supra, Note 18, p. 263.
39. Ibid., p. 265
40. Ibid., p. 264.
41. Ibid
42. Supra, Note 6, p. 381.
43. Supra, Note 11, pp. 356-357.
44. Supra, Note 18, p. 267.
45. Supra, Note 6, p. 313.
46. Supra, Note 11, p. 357.
47. Zarina Jan v Akbar Jan, PLD 1975 Peshawar 252.
48. Kamal Khan v Zainab, PLD 1983 Lahore 546.
49. Zainab v Kamal Khan, PLD 1990 S.C. 1051.
50. Muhammad Fikree v Fikree Development Corporation, PLD 1988 Karachi 446
51. Farishta v The Federation of Pakistan, PLD 1980 Peshawar 47.
52. Federation of Pakistan v Farishta, PLD 1981 S.C. 120.
53. Supra, Note 6, p. 184.
54. Supra, Note 11, p. 358.
55. J.N.D. Anderson, Modern Trends in Islamic: Legal Reforms and Modernization in the Middle East 1971, International and Comparative Law, Quarterly (Vol. 20), pp. 1-21 at 10.

10

Other Reforms Relating to Inheritance

1 The Problem of Non-Participation of the Widow in Return

Under the traditional *Shariah* doctrine, when the spouse relict is the only legal heir, the residual estate is inherited by him/her (*Maliki* law), or escheats to (general Sunni Law) the Public Treasury. However, the practice in India and Pakistan has been that the spouse relict should take the residual estate by way of *radd* (Return) in the absence of any other legal heir. In 1925, the same rule was adopted in the Sudan. Traditional Sunni law maintains that in the absence of any relative—Sharer, Residuary or Distant Kindred—residual rights of succession belong to a person with whom the deceased has finally acknowledged a relationship (other than paternity). Such a person, acknowledged by the deceased as his brother, nephew, uncle or cousin, is an entitled residuary heir provided he is of unknown parentage. If his parentage is known and proved to be other than the one alleged in the acknowledgement, the acknowledgement is demonstrably false and, therefore, constitutes no ground for rights of succession.

Egypt and Syria have both adopted the rule of *radd* (Return) to the spouse relict in the absence of any surviving blood relative and the claim of the spouse to *radd* precedes that of any acknowledged kinsman.[1] Jordan adopted this reform in the year 1976.[2] Tunisia has gone further than any other country in improving the position of the spouse relict in this regard. The Law of 1959 adopted the general doctrine of *radd*, but in so doing made no explicit distinction between the spouse relict and other Quranic heirs. The reform has two principal effects. First, the spouse relict participates in *radd* along with other Quranic heirs and secondly, since Tunisia still holds to the general Maliki rule that Distant Kindred has no right of succession, the spouse relict takes from *radd*

mothers, as residuary heirs, were de facto excluded from succession because there was no residue left. Since the rights of the husband and mother, as an heir by marriage and an ascendant respectively, were undisputed, the case resolved itself into a straightforward competition for the remaining one third of the estate between the full and the uterine collaterals. In a sense, therefore, this competition between the *asaba* and the Quranic heirs epitomised the conflict between the old and the new society; and the full brothers, despite their traditional preeminence as agnatic heirs, had in effect been totally ousted from succession by the new uterine heirs. However, on appeal by the full brothers, Umar revised his decision and ordered that the one-third of the estate remaining after the deduction of the husband's and mother's portions should be distributed in equal share among the full and the uterine brothers.[7]

From the standpoint of Islamic legal theory, the case of the *Himariyya* raises the fundamental issue of the role that may be played by human reason in the elaboration of the *Shariah* law. Classical Sunni jurisprudence upholds the principle that law-making is for Allah alone. His comprehensive law has been revealed in the Quran and the divinely inspired activities of the Prophet Muhammad (PBUH). The purpose of jurisprudence was simply to ascertain the precise terms of that law as it applied to any given case. Human reason, therefore, could not make law by freely speculating in terms of social desirability, upon the ends or purposes that law should serve, and formulating appropriate rules on that basis. It could only discover Allah's law through interpretation of the divine revelation and the proper application of the principles established therein to cases not specifically regulated by the divine texts themselves. Within these accepted limits, the jurisprudential debate turned upon the precise modes of reasoning which could legitimately be employed. Analogical deduction, or *qiyas*, was accepted by the general consensus of opinion as a valid method of extending the principle embodied in a specific ruling of the Quran or *Sunnah* to cover closely parallel cases. For many jurists, indeed, this was the only acceptable method of reasoning. But others maintained that in particular cases strict analogy could occasion injustice, and it was then permissible to resolve a problem on broad equitable considerations. This process was given the name *istihsan*, which means 'seeking the best solution' or 'juristic preference'. In the contemplation of classical jurisprudence, the *Himariyya* ruling can rest only upon the principle of

agnate ascendants, which, as a whole, is superior to the class of collateral relatives. As regards the class of male agnatic descendants, it is an established rule that, in the absence of the son, the nearest member of the class—the son's son—takes precisely the same position in the scheme of priorities that the son would have occupied. Similarly, in the absence of the father, the grandfather, as the nearest male agnate ascendant, should occupy the same position as the father and exclude the collaterals just as he would have done.[10]

Under Ali's doctrine, the position of the collaterals on the one hand and the grandfather on the other is separately determined by reference to the other heirs that are competing, and both parties then inherit on normal principles. Full brothers are always taken as residuary heirs and usually exclude consanguine brothers or sisters. Consanguine brothers are taken as residuary heirs in the absence of full brothers but do not exclude a full sister from her Quranic share, while both full and consanguine brothers convert their respective sisters into residuary heirs. Sisters unaccompanied by brothers are taken as Quranic heirs, except in the presence of a daughter or son's daughter, where they inherit as Residuary heirs. On the same analogy, according to Ali's doctrine, the grandfather would inherit as a residuary heir of equal standing with brothers who are entitled, but takes as a Quranic heir in the presence of a daughter or son's daughter of the deceased. However, the grandfather's share, he being a Quranic heir, cannot be less than 1/6, whether he takes as a Sharer or a residuary.

According to Zaid's doctrine, the grandfather is always, basically, a residuary heir (whether a daughter or son's daughter of the deceased is present or not), with two further rules to his advantage:[11]

1 Sisters never take as Quranic heirs but are converted into residuary heirs by the grandfather who would accordingly take double their share.

2 The grandfather is entitled to a minimum portion of one-third of the collective entitlement of himself and the collaterals, whether this is the whole estate or the residue after deduction of other Quranic portions.

Zaid's doctrine gives greater advantage to the grandfather than Ali's doctrine. It is Zaid's doctrine, which, with certain modifications subsequently introduced, became the authoritative doctrine of the Maliki, Shafii and Hanbali Schools. Zaid's doctrine with rule (1) above

and not vice (2) is the principle followed by the Shia school in the matter of distribution during the co-existence of grandfather and collaterals. However, Shia law is far too extensive because it also includes maternal grandparents and uterine brothers and sisters in this category.

The reforms in Jordan have taken into consideration the problem of the possible exclusion from succession of full or agnatic collaterals by the paternal grandfather as the remaining agnate. The law in Jordan introduced Maliki's solution by providing that these brothers, or brothers and sisters, share the residue with the grandfather by standing on parity with him as agnates.[12]

4. Forced Relinquishment of Their Shares by Female Sharers

Although the rights of all heirs including female heirs, are clearly specified in the Islamic law of inheritance, yet frequently there have been cases where close male relatives like father, brothers, sons, try to oust their female co-heirs from succession. This problem has been particularly serious amongst Muslims in Pakistan and India. One of the main reasons for this was that prior to the independence of Pakistan and India, the customary law of the area concerned was applied in the matter of inheritance, and, in general, the customary law dictated that the females were excluded from succession of the estate of a deceased. There were of course certain areas in British India where the customary law was the same as the personal law of the Muslims and Hindus. But in most areas, particularly the Punjab, the customary law was different from the Muslim Personal Law. The Muslim Personal law was made applicable to all Muslims in India under the Muslim Personal Law (Shariat) Application Act, 1937 in all questions regarding intestate succession notwithstanding any custom or usage to the contrary. However, questions relating to the agricultural land were excluded from the scope of the Act.[13] Consequently; the customary law continued to apply in the matter of intestate succession as far as agricultural land was concerned. This exception regarding agricultural land was also removed after the Independence of Pakistan under various statutes.[14] Now, women could receive their share in the inheritance according to *Shariah* in agricultural land as well.

The participation in inheritance by female relatives was resisted by their male relatives in many cases. They had grown used to, under the customary law, to take the entire estate to the complete exclusion of their female relatives. Another reason advanced at times was that since the male relatives particularly father and brothers, had to spend large sums on the marriages of their daughters and sisters, particularly on giving them dowry, therefore, their right to share in the inheritance stood forfeited. Another very significant reason, particularly in respect of agricultural land, was that the males in the family did not want to share their agricultural land with outsiders. The in-laws of daughters and sisters have been regarded as outsiders and sharing the agricultural land with brothers-in-law and sons-in-law was deeply resented. Therefore, efforts were made to deny the right of inheritance to daughters, sisters and mothers and the following methods were generally adopted:

1. The brothers, who were generally in possession of the agricultural land, would plead title of the land on the basis of adverse possession.
2. The mothers, sisters and daughters, who are generally dependent on their close male relatives and are easily vulnerable to emotional blackmail, were coerced into relinquishing their shares in the inheritance.

The Supreme Court of Pakistan took notice of the plight of female heirs in a case coming before it and laid down certain principles for the protection of the rights of female heirs in intestate succession.[15] Some of the findings in the case on this issue are discussed below:

i. A brother cannot legally claim 'adverse possession' against his sister. The possession of one heir over the property of the deceased would be deemed to be possession of all heirs and the heirs not in actual physical possession of the property would be considered to be in constructive possession of the same. Thus possession of the brothers would be taken to be the possession of their sisters.

ii. The recognition and enforcement of the law of inheritance by the State agencies including the courts, vis-a-vis the female heirs, is a matter of 'public policy' in Islam.

iii. The so-called 'relinquishment' by a female of her inheritance is opposed to 'public policy' as understood in the Islamic

...ness with reference to Islamic jurisprudence. In other words, ...ny disputed relinquishment of the right of inheritance, even ...f proved, has to be found against public policy. Even if a ...male heir agrees to the relinquishment, the agreement and ...contract constituting the relinquishment would be void being ...against public policy.

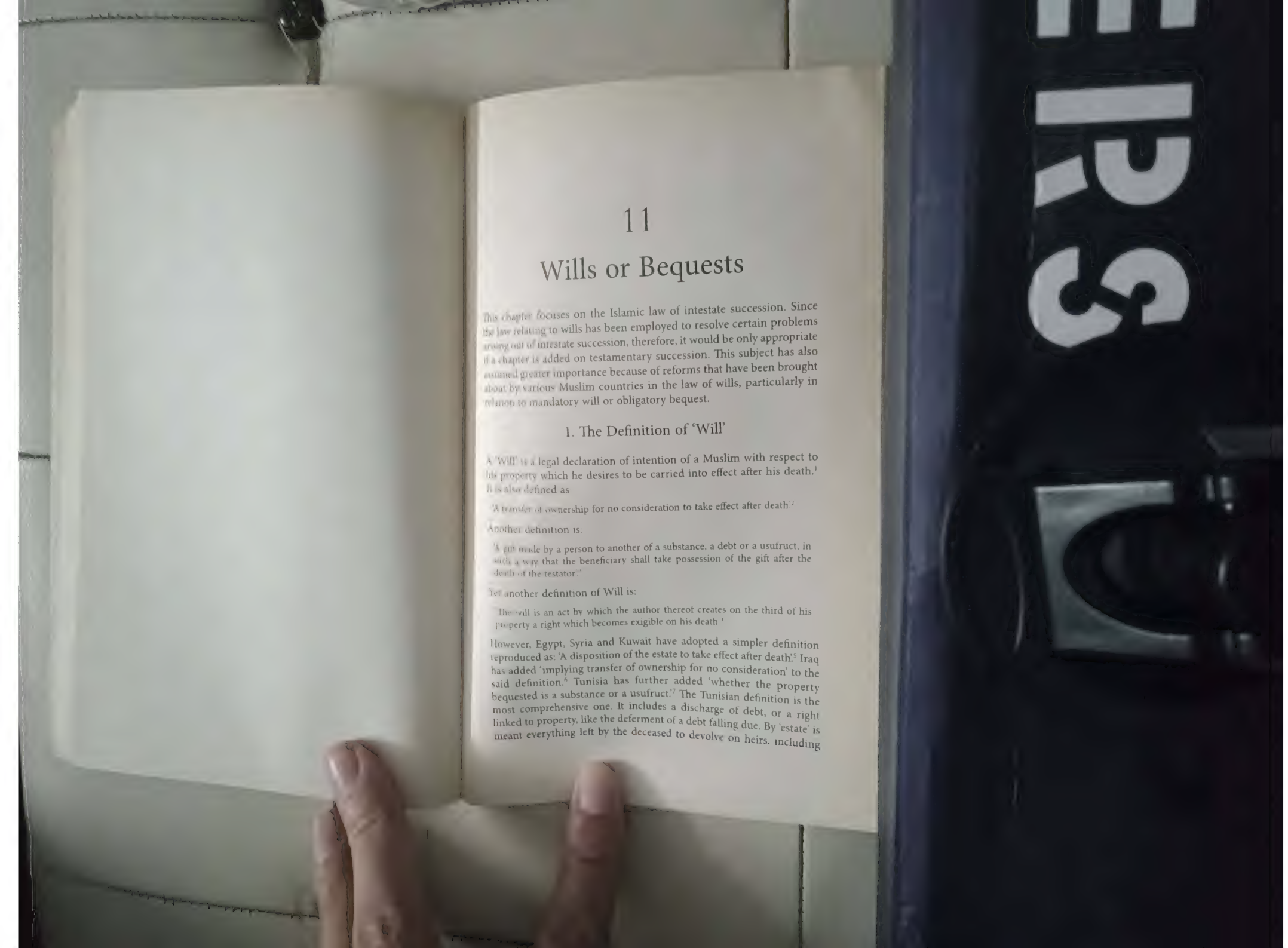
...The principles regarding treatment of women in Islam; particularly those who are close relatives like daughters, sisters, wives and mothers and others similarly placed; require that their rights be self enforcing. Therefore, the claim of a brother that his sister relinquished her share in the inheritance in his favour is immoral on the touchstone of Islamic principles.

...Even if there is alienation through sale or gift by a female heir in favour of a male heir, it would be subject to protection afforded by the law against undue influence. The presumption regarding undue influence exists in all such transactions and the burden of proof would fall heavily on the male transferee to satisfy that the transaction was bonafide.

The Supreme Court of Pakistan has thus afforded protection to the female heirs from coercion, undue influence and explanations at the hands of their near male relatives bent upon denying them their lawful share in the estate of the deceased according to Shariah.

Notes

1. N.J. Coulson, *Succession in the Muslim Family*, Cambridge, Cambridge University Press, 1971, p. 139.
2. Lynn Welchmann, The Development of Islamic Family Law in the Legal System of Jordan. 1988 International and Comparative Law Quarterly, (Vol. 37), pp. 868-886, at 880
3. Supra, Note 1, pp. 139-149
4. J.N.D. Anderson, Modern Trends in Islam; Legal Reforms and Modernisation in the Middle East. 1971 International and Comparative Law Quarterly (Vol. 20), pp. 1-21 at 11.
5. Ahmad Ibrahim, Islamic Law in Malaya, Malayasian Sociological Research Institute Ltd., Singapore, 1965, p. 252.
6. Re Mutchilim, (1960) 26 M.L.J. 25 quoted by Ahmad Ibrahim, Ibid., p. 256.
7. Supra, Note 1, pp. 75-77.
8. The division of the four Sunni schools on the Himariyya issue is rather curious in view of their respective doctrines on jurisprudential theory. The two schools which accept the Himariyya rule—the Malikis and Shafiis—do not in theory approve of '*istihsan*'. Shafii himself in fact, subsequently condemned it as tantamount to man-made legislation. On the other hands, the Hanafis, who are reputedly the particular champions of '*istihsan*', reject the Himariyya rule. Only the Hanbalis appear to be systematically consistent in this respect, rejecting the principle of '*istihsan*' and with it the Himariyya rule.
9. Supra, Note 2, p. 879.
10. Supra, Note 1, pp. 79-81
11. Ibid., pp. 82-84.
12. Supra, Note 2, pp. 880-881
13. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 (Act XXII of 1937)
14. See The Punjab Muslim Personal Law (Shariat) Application Act, 1948; The Muslim Personal Law (Shariat) Application (Sind Amendment) Act, 1952; The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962.
15. Ghulam Ali v Ghulam Sarwar Naqvi, PLD 1990 S.C. 1.



11

Wills or Bequests

This chapter focuses on the Islamic law of intestate succession. Since the law relating to wills has been employed to resolve certain problems arising out of intestate succession, therefore, it would be only appropriate if a chapter is added on testamentary succession. This subject has also assumed greater importance because of reforms that have been brought about by various Muslim countries in the law of wills, particularly in relation to mandatory will or obligatory bequest.

1. The Definition of 'Will'

A 'Will' is a legal declaration of intention of a Muslim with respect to his property which he desires to be carried into effect after his death.[1] It is also defined as:

> 'A transfer of ownership for no consideration to take effect after death.'[2]

Another definition is:

> 'A gift made by a person to another of a substance, a debt or a usufruct, in such a way that the beneficiary shall take possession of the gift after the death of the testator.'[3]

Yet another definition of Will is:

> 'The will is an act by which the author thereof creates on the third of his property a right which becomes exigible on his death.'[4]

However, Egypt, Syria and Kuwait have adopted a simpler definition reproduced as: 'A disposition of the estate to take effect after death.'[5] Iraq has added 'implying transfer of ownership for no consideration' to the said definition.[6] Tunisia has further added 'whether the property bequested is a substance or a usufruct.'[7] The Tunisian definition is the most comprehensive one. It includes a discharge of debt, or a right linked to property, like the deferment of a debt falling due. By 'estate' is meant everything left by the deceased to devolve on heirs, including

law that the person making the will has reached 18 calendar years of age, which is 3 years under the Egyptian and Kuwaiti age of majority. The law in Egypt and Kuwait is based on the Shafii view which is more restrictive than that of the Hanafi, Maliki and Hanbali who allow a will by a prodigal.[21] The Tunisian law allows will by a prodigal provided that such a will is passed by the court.[22] A bequest made by a minor may be validated by subsequent ratification.[23] The Shia law requires that the testator must be 'free, adult, of sound mind and acting on his own free will'.[24] However, the Shias allow a will by a boy of 10 and a prodigal under interdiction if it is for charity.[25]

A will made by a person of unsound mind is void and it does not become valid by his becoming of sound mind subsequently. A will made by a person while of a sound mind becomes invalid if the testator subsequently becomes permanently of unsound mind. But when insanity has not lasted for more than six months, bequest is not avoided.[26] The Egyptian and Syrian laws provide that a will should be void if the testator became incessantly insane until death.[27] The Iraqi law provides that the will should become void on the testator losing his legal capacity until his death.[28]

Bequests by *parda nashin*' ladies (women in seclusion) are allowed but subject to strict proof. Cases of procurement, such as undue influence or even coercion, often arise in cases where heirs allege that the deceased was a '*parda nashin*' lady. The rule in this situation is that the burden lies on the beneficiary to prove that the '*parda nashin*' knew what she was doing, that the transaction was explained to her, and that she had good independent advice in making the bequest at arm's length from the beneficiary.

4. The Beneficiary or Legatee

The beneficiary of a will may be an individual or individuals, a more or less defined group of persons, or an organization, or the proceeds of a bequest may be used for some purpose. In the event of many beneficiaries, under the Hanafi law, the whole bequest shall be taken by the surviving beneficiaries if one or more die before the testator, unless each beneficiary was allotted a definite part of the bequest with each having such a part of the bequest as he would have taken if all the beneficiaries had survived the testator.[29] For the Shias, a bequest to a person who predeceased the testator shall pass to his/her heirs[30] unless

it is revoked by the testator. But if the beneficiary/legatee should die without leaving any heir, the legacy would pass to the heirs of the testator.[31]

The beneficiary must be identifiable, in existence at the time of the making of the will and not a belligerent nor murderer or accomplice to the murder of the testator. Identification of the beneficiary may be by recognized name, such as 'A, the son of B' or a named mosque or institute, by demonstrating, such as 'this woman' or 'the embryo in this woman's womb' or by description, such as 'the poor of my village'. No will shall be valid if the beneficiary is unidentifiable or not clearly identified.[32] A will made in favour of these two men' is held by Abu Hanifa to be void because it is not clear which of them is meant.[33] The Egyptian and Syrian laws require the beneficiary to be known.[34]

If the beneficiary/beneficiaries are identified by description, such as 'the children of X', the majority of Sunni jurists, except the Malikis, stipulate that while the beneficiary may not have existed at the time of the making of the will, it must exist at the time of testator's death, subject to the condition that children born more than six months after the death of the testator shall not be entitled to any part of the bequest.[35] The Maliki doctrine allows the entitlement of the embryos born after the testator's death which view has been incorporated in the law of Morocco.[36] A bequest, in India, to unborn is void unless it is for a child who, at the time when the bequest is made, is in the womb of its mother and is born within six months thereafter.[37] In Pakistan, a bequest to a person born after the bequest but before the death of testator was held valid.[38] The Shias allow upto nine months, provided it is possible through the symptoms of pregnancy, to preserve its existence at the time of the making of the will.[39] The Egyptian and the Algerian laws have adopted the Maliki doctrine.[40] The Iraqi law follows the Hanafi position.[41] The Tunisian law stipulates that the embryos must exist at the time of making the will, and that it is born alive.[42]

Under the Shia law, it is irrelevant whether the pregnant woman is married or is in her '*iddat*' of divorce or death.[43] The Hanafis distinguish between two cases: where the testator acknowledges and where he fails to acknowledge the existence of the embryo beneficiary at the time of making the will. In the first case, the will shall be valid if the child is born within two years of the making of the will, whether the mother is married or in her '*iddat*' of divorce or death. In the second case, there

a further distinction between two contingencies: if the mother-to-be is actually or deemed to be married, e.g. in her '*iddat*' of a revocable divorce, when the will shall be valid only if the child is born less than six months after the making of the will, but if she is in her '*iddat*' of an irrevocable divorce or of death, the will shall be valid if the child is born within two years.[44] This Hanafi doctrine was adopted in Egypt until the promulgation of the Will Act 71/1946 which made the minimum and maximum terms of pregnancy for the purposes of the will nine months (270 days) and one solar year (365 days) respectively while maintaining the basic Hanafi provisions.[45] In the event of multiple births, the babies born alive shall share the bequest equally.[46] Apart from individuals, the beneficiary may be a juristic person of charitable character, in which case it is not required to be in existence at the time bequest is made.[47]

A bequest may be validly made by a Muslim in favour of a *zimmi*, i.e. a non-Muslim living under the protection of a Muslim government. However, it is a condition for the validity of the will that beneficiary should not be belligerent, according to Hanafis and Shias. Difference of religion does not invalidate a will unlike inheritance. Nevertheless, the modern laws of Egypt, Syria, Tunisia and Kuwait stipulate only the principle of reciprocity in so far as a national of a foreign country is concerned.[48] The Iraqi law, apart from following the principle of reciprocity, restricts bequests in favour of legatees, whose religion differs from that of the testator, to bequests of moveable property only.[49]

According to the Hanafi law, no will is valid for a beneficiary who causes the death of the testator, whether the will is made before or after the act causing death, even if he has unintentionally caused the death of the testator. Abu Hanifa and Imam Muhammad held (Abu Yusuf dissenting), that such a bequest may be validated by the consent of the heirs, and that if the beneficiary is the sole heir, the bequest to him is valid.[50] In Shia law, the bar only operates if the beneficiary is guilty of deliberate homicide of the testator. The Shafii law allows even a murderer to take a legacy from his victim, though he may not of course inherit. The Malikis and Hanbalis consider the issue in terms of the personal wishes of the testator because a testator would not wish to benefit his killer and that he would, given the opportunity, revoke the bequest.[51] Therefore, the authoritative view of the Maliki and Hanbali schools is that a will shall become void if the beneficiary murdered the testator after the making of the will. But if the cause of death preceded the making of the

will, it shall be valid in deference to the wish of the testator.[52] The Moroccan law has adopted this view.[53]

Under the Iraqi law, a killer of the testator is disqualified as a beneficiary.[54] The Algerian law disqualifies a beneficiary who kills the testator with intent.[55] The Egyptian and Syrian laws set as a ground for the disentitlement to mandatory or voluntary will, the murder of the testator with intent, whether the murderer is a principal killer, an accomplice or a perjurer whose false evidence resulted in a death sentence against the testator being passed and executed, if the killing was not for just cause or reasonable excuse, and the murderer was of sound mind and not under 15 years of age.[56] However, the Egyptian and Kuwaiti laws hold the using of excessive force in self-defence as a reasonable excuse.[57]

5. The Limits on Testamentary Powers

The law of bequest derives its origin from the following Quranic verses:

"It is prescribed for you, when death approaches one of you, if he leave wealth, that he bequeath unto parents and near relatives in kindness. (This is a duty for all those who ward off evil)"

(The Quran *Surah Al Baqarah* 2:180).

"(In the case of) those of you who are about to die and leave behind them wives, they should bequeath unto their wives a provision for the year…"

(The Quran *Surah Al Baqarah* 2:240).

These Quranic verses, the first of which is generally known as 'the verse of bequests' represent historically the first Islamic regulation on the subject of succession. They enjoin testamentary disposition only, or primarily, as a means by which the deceased might make suitable provision for his surviving relatives, and for this reason the verses were generally held to be superseded by the Quranic verses which laid down the rules of inheritance. The *Surah Al Baqarah* in which the verse of bequest (2:180) occurs was, however, promulgated in the second year of the *Hijra* (i.e. in AD 622-623), whereas the verse by which parents are declared to be heirs is (*Surah An Nisa* 4:12) promulgated after the battle of Ohod in the third year of *Hijra*.[58] The Quranic rules of inheritance were never regarded as applying only in the case of persons who died wholly or partially intestate. The juristic consensus held that the general

duty of the deceased to transmit his property to his relatives had become superseded; a permissive and discretionary system of succession to property at death had now been replaced by mandatory rules which prescribed the entitlement of the different relatives in terms of a fixed fractional share of the estate.[59]

At the same time, the Quran itself clearly still allowed some power of testamentary disposition inasmuch as the shares of inheritance that it allowed were specifically described as portions of residual estate left after the payment of any bequests and debts'. Hence, it was obvious from the verses of bequests that the two systems of voluntary and compulsory devolution of property had to co-exist and that the entire estate could not be subject to disposal through bequests leaving the rules of inheritance virtually redundant. Thus, only a portion of the estate of a deceased could be subject to disposal and, therefore, principles had to be evolved setting limits on the testamentary powers.

There is consensus amongst the jurists of all the Sunni and Shia schools that a Muslim cannot by will dispose of more than a third of his estate after payment of funeral expenses and debts. This restriction is based upon the *Sunnah* of the Prophet Muhammad (PBUH) reported by Saad Ibn Abi Waqqas as under:[60]

> I was ill in the year of the conquest of Mecca, and was near dying, and the Prophet came to see me, and I said: 'Oh Messenger of God, verily I have much property, and no heir except my daughter, may I then make a will, having all my wealth for religious and charitable purposes?' He said "No". I said "May I do so with 2/3 of it?" He said "No". I said "Shall I with 1/2 of it?" He said "No". I said "May I with 1/3 of it?" His Highness said, "Make a will disposing of 1/3 in that manner; for 1/3 is a great deal, particularly of thus great wealth which you possess, for verily if you die and leave your heirs rich, it is better than leaving them poor to beg, for verily the money which you expend for God's pleasure, you will be rewarded for, even to the mouth which you lift up to your wife's mouth"

A bequest in a will in excess of one third may be validated by the consent of the heirs, expressly or by implication after the death of the testator.[61] Bequest comprising entire property is not void *ab initio*. It may be validated by assent of all the heirs.[62] This is the Sunni doctrine. The Shias allow such consent to be given before the death of the testator, in which case the heirs cannot withdraw it after his death. Where some and not all the heirs consent to the bequest, it shall be payable to the

beneficiary from the shares of the consenting heirs only.[63] In Malay States, the rule of Muslim law under which a man has the power to dispose by will of not more than one-third of his property belonging to him at the time of death, is followed.[64]

6. The Validity of Will in Favour of Heirs

A bequest to a heir is not valid unless the other heirs consent to the bequest after the death of the testator. There has been a great controversy over this requirement. At one extreme, the Zahiris and some Malikis, Shafis and Hanbalis rule that a will to an heir is utterly void, on the authority of a tradition of the Prophet to that effect. Abu Imama reported: 'I heard the Prophet say: "Allah has already given to each entitled relative his proper entitlement. Therefore, no bequest in favour of a legal heir". The aforesaid jurists deem it as an act of injunction against the other heirs who may allow it, in which case it shall not be a bequest but a gift. On the other hand, the Shia Ithna Ashari and Zaidi schools accept as valid a will to an heir within one-third of the net estate without requiring the consent of the other heirs. A middle course is steered by the Hanafis and majority of Malikis. Shafiis and Hanbalis who hold that a will to an heir is valid subject to the consent of the other heirs, adding to the cited tradition of the Prophet 'except if allowed by the heirs'.[65]

The courts in Pakistan and India strictly follow the Hanafi doctrine for Sunnis and do not recognise any will to an heir without the consent of the rest of the heirs.[66] Any single heir, however, may consent to bind his own share.[67] The Moroccan law has followed the minority view of Malikis, Shafiis and Hanbalis and has laid down that 'the beneficiary shall not be a presumptive heir at the time of the death of the testator'.[68] The Egyptian Will Act equates an heir with a non-heir as a valid beneficiary of a will without requiring the consent of the heirs following the Ithna Ashari opinion.[69] The Syrian, Algerian and Tunisian laws make such a will to an heir subject to approval of other heirs.[70] The Iraqi law simply provides that the bequest should be within one-third of the estate without specifying that the beneficiary may or may not be an heir.[71] Some Shia jurists, followed by Druzes, allow a bequest of the whole or any part of the estate to an heir or non-heir.[72] However, in the Malay States, the will of a Muslim which attempts to prefer one heir by giving him a bigger share of the estate than he is entitled to by the

Muslim law, is wholly invalid as to such bequest without the consent of the other heirs.[73]

However, in determining whether a person is or is not an heir, the crucial time is that of the testator's death and not time of the execution of the will. Therefore, if a person was a presumptive heir at the time of making of the will but he ceases to be an heir at the time of death of the testator, the will, provided it is within the permissible third, is valid. For example, a person executes a will in favour of his full brother to the extent of one fourth of the property when he had no children and the brother is his presumptive heir. Subsequently, a son is born to the testator before his death, the brother ceases to be his heir having been excluded by the son and the will in favour of the brother would become valid. Similarly, the fraction of the estate of deceased has relevance to the time of death of the testator and not the time of the execution of the will. A person, at the time of the execution of the will may bequeath one-half of his property, but later acquires more property and at the time of his death, the property bequeathed may come within the permissible one-third.

7. The Subject Matter of the Will

A will may be made of moveable or immoveable (real) property, monies, rights *in rem*, all of which are inheritable, or it may be a usufruct (whether for life or for a definite period), or anything of value which is capable of being transferred. The subject matter of a will can be a part of a property or a right in a divisible or indivisible property provided such property of which it is a part exists at the time of the death of the testator. A property under will need not be in the actual possession of the testator at the time of his death, but may be in the hands of a third party, e.g. a debt with a debtor, or even in the occupation of usurper asserting adverse rights.

The subject matter of the bequest need not be in existence at the time of the testator's death. The reason is that a will takes effect from the moment of the testator's death, and not earlier.[74] This is the view that prevails in Pakistan and India. However, the view in the Arab countries, except for Algeria, is to the contrary. A will is void there if its subject matter is not existing at the time when the will is made. The reason advanced is that no person has the right to dispose the property he does

Therefore, a will remains void even if the testator becomes the owner of the subject of bequest, unless a new will is then made.[75]

Like the taxable estate, a bequest must be capable of being assessed, measured and used, such as property—both moveable and immoveable,—rights and contracts, apart from personal non pecuniary rights and uses. No testator can create by will an estate repugnant to law. Things that are outside the realm of trade and cannot be object of property and the sale of which is void, e.g., animals' blood and pigs, cannot be valid matters of a Muslim's will. The same applies to things in which there is no ownership, such as air and water, rivers and public roads.[76]

Where the bequest is of a right to take profits of a house, the beneficiary, unless under Shafii law, has no right to live in it. The apparent reason is that the heirs of the deceased are entitled to manage property whose only obligation in such a case is to pay the rents to the legatee. Of course, heirs may permit him to occupy it. Under Shafii law, the legatee becomes like a tenant of the property.[77]

The Egyptian law provides that "The bequest is stipulated to be (1) an object that can be inherited or may be an object for a contract during the life of the testator; (2) a valuable asset in the possession of the testator if it is a property; (3) owned by the testator, if it was definite [illegible] at the time of the will." Kuwait adopted Egyptian law with the modification that a will could take effect in the future and can be made subject to a valid condition.[78] The Syrian law also adopted the Egyptian law emphasising that the ownership of the bequest must be transferable on the death of the testator and should constitute a valuable asset according to the religious law.[79] The Iraqi law only requires transferability of the ownership of the bequest after the death of the testator.[81] The Algerian law allows the testator to make a bequest of the property which he owns or is going to own before his death, be it a substance or a usufruct.[82] Moroccan law simply rules that the bequest must be capable of being taken possession of.[83]

8. The Object of the Will

A will to benefit an object opposed to Islam is invalid.[84] such as a bequest to a gambling house or to a bar. Bequests which are outwardly unquestionable, but which have been made for a concealed immoral purpose would also be void in Hanafi law, when the emphasis is on the

term, but would be void in Hanbali law where, because of strong moralism of that school, a bequest inspired by an improper motive would not be effective. An example of the Hanbali rule, which was adopted in Egypt in 1946, is a bequest by the testator to Mr X which, although not stated, is in gratitude for having kept him supplied with liquor, or a bequest to Miss Y, which is impliedly granted in recognition of her services as his mistress. Both bequests are void under the Hanbali law.[85]

9. The Abatement of Bequests

Where the bequests to more than one beneficiaries exceed one-third of the estate, Sunni law interprets them in either of the following manner:[86]

a. There is an assumption on the part of the testator to deal with more than 1/3 of the estate—in which case the bequest that is earlier in point of time has priority over the later because the testator is presumed to know and bear in mind that he can bequeath only 1/3 of the estate.

b. If there is such a repugnance between the two bequests as to indicate that the testator did not intend both bequests to take effect, but only one; in which case the later bequest prevails, and the former is presumed to be revoked.

Abu Hanifa held that if a bequest is in excess of 1/3 of the estate, then it should be cut down to 1/3, and the beneficiaries share *inter se* is reduced proportionately. In case there are more than one bequests and one of them exceeds 1/3 of the estate, then such a legacy is to be cut down to 1/3 and the beneficiaries would share only in that proportion in competition with other beneficiaries. If A bequests 1/2 of his estate to X and 1/4 to Y, according to Abu Hanifa, the bequeathable 1/3 of the estate has to be divided between them in the proportion of 1/3 and 1/4 and not 1/2 and 1/4. His disciples, Abu Yusuf and Imam Muhammad, did not accept his view and would allow shares in the proportion of 1/2 and 1/4.[87]

The Shia law does not recognise the principle of proportionate distribution and the prior legatee/legatees would be given preference.[88] If a testator bequeaths 1/3 of his estate to A, then 1/4 to B and then 1/6

to C, and the heirs withhold their consent to the excess. A, the prior legatee would take the entire 1/3 and B and C would take nothing.

10. The Revocation of Bequests

A bequest may be revoked by the testator, either by express declaration, oral or written, or by any act showing an intention to revoke it, like destroying the subject matter or transferring it to another person. The destruction of something includes complete change of its character so that it would ordinarily be described by a different word.[89] Alienation of the property by the testator through sale, gift or any other means would also operate as implied revocation. A bequest to a person is revoked impliedly by a bequest in a subsequent will of the same property to another.[90] But a subsequent, though it be of the same property, to another person in the same will, does not operate as a revocation of the prior bequest and the bequeathed property would be divided between the two legatees in equal share.[91]

11. The Conditional Bequests

A conditional bequest is a bequest coupled with a condition which seeks to regulate either the manner in which the property bequeathed shall be enjoyed or the general conduct and activities of the beneficiaries. If the condition is deemed valid, it will be enforced against the beneficiaries or alternatively, its infringement will entail forfeiture of the bequest. But if the condition is deemed invalid, the normal doctrine of severance will apply: the condition will be ignored and the bequest will remain valid.[92]

A bequest of the corpus of property transfers full and absolute ownership to the legatee, and any condition which contradicts this essential legal effect of the transaction is a nullity. If, for example, a house is bequeathed on condition that the legatee does not sell it or let it, and that on his death it would revert to the testator's heirs, the conditions are void and the legatee takes the house as absolute owner.

12. Deathbed Disposition of Property

A gift made in mortal sickness is regarded as a bequest and that it cannot operate on more than a third of the estate of the testator. A gift

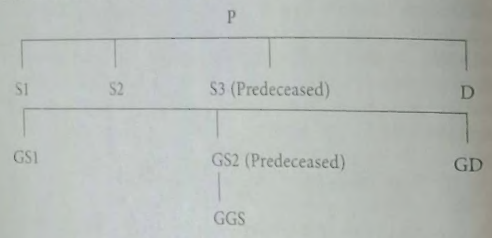
is said to have been made in mortal sickness (*marz-ul-maut*), only if it was at the time, and seemed to the donor himself highly probable that the malady would soon end fatally and it did in fact so end.[93] Where the malady is of long continuance, as for instance, consumption or albuminuria, and there is no immediate apprehension of death, the malady is not *marz-ul-maut*; but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and does in fact result in death. In short, a gift must be deemed to have been made during *marz-ul-maut* if it was made, in the words of Privy Council, "under pressure of the sense of the imminence of death."[94] *Marz-ul-maut* is not always capable of direct proof by any objective standard but a matter of inference to be raised from certain proved or admitted facts.[95]

13. The Mandatory Will or Obligatory Bequest

The mandatory will or obligatory bequest is a device introduced as a remedy for the difficulties of those grandchildren whose parents die during the life-time of their father or mother, or die or are deemed to die with them, e.g. as a result of air crash, sinking ship, building collapse or fire.[96] Such grandchildren rarely inherit on the death of their grandparents, as they are often excluded from inheritance by their uncles and aunts, even though their dead parents might have contributed to the wealth of the grandparents.

The Egyptian law provides that if the deceased has left no will for the descendants of a child of his who died before, or is deemed to have died with him, bequeathing to such grandchildren the share of the estate that would have devolved on the child had he been alive; there should be a mandatory will to the extent of such share within the limits of one-third of the estate, provided that the said descendant is not an heir, and that the deceased has not given thereto, for no consideration, by another disposition, the amount due thereto. If the gift is less than the said amount, the will should operate for the balance. Such a mandatory will is meant to be for the benefit of the first class of the descendants if the lineal sons or daughters, howsoever low, with every ascendant excluding his respective descendant but not any other descendant. The share of every ascendant shall be divided among the descendants thereof according to the rules of inheritance as if the ancestor(s) through whom they are related to the descendant had died after him.[97]

Although the language of the Egyptian provision is complex, it has comprehensively taken care of not only predeceased children but also predeceased grandchildren. The following example will make it clear. Suppose a praepositus P died leaving behind two sons S1 and S2, daughter D, and one grandson GS1 and one granddaughter GD1 from a predeceased son S3 and a son GGS from predeceased grandson GS2. The distribution of the estate of P will be made as under:



In the first place, distribution will be done at the first stage presuming that S3 is alive at the time of P's death. The three sons, S1, S2 and S3 will receive 2/7 each and D will receive 1/7. Since the share of S3 is within permissible 1/3, it will devolve on his heirs through mandatory will. At the second stage, the estate of S3 will be distributed among his lineal descendants assuming his predeceased son GS2 alive. Thus GS1 and GS2 will each get 2/5 and GD 1/5 of the estate of S3. In order to find out these shares as fractions of the estate of P, they will be multiplied by 2/7, the share of S3. Thus, GS1 gets 4/35, GS2 4/35 and GD 2/35. The share of GS2 will then descend to his son GGS. So, the claimants receive as follows:

S1	=	2/7
S2	=	2/7
D	=	1/7
GS1	=	4/35
GD	=	2/35
GGS	=	4/35

The Egyptian law further provides that if the beneficiary who is qualified to benefit from a mandatory will has been left in a will by the deceased

a bequest in excess of what is due thereto, the excess shall be decreed a voluntary will. If the deceased left a will for only some of those qualified for a mandatory will, the rest shall be entitled to their due.[98] The mandatory will should take precedence over all voluntary wills.[99]

The juristic basis of the doctrine of mandatory will for non-heirs among relatives derives from a number of jurists and authorities on jurisprudence and traditions from the Prophet (PBUH) among whom are Saieed Ibn ul Musayyab, Al Hassan-al-Bisri, Tawoos, Imam Ahmad, Dawood Al-Tibri and Ibn Hazm.[100] The ultimate authority is the Quranic ruling:

'It is prescribed for you, when death approacheth one of you, if he leave wealth, that he bequeath unto parents and near relatives in kindness. (This is) a duty for all those who ward off (evil)'.[101]

However, the doctrine of the mandatory will with all provisions related to in the Egyptian law has been adopted by Syria, Iraq, Tunisia and Jordan.[102] There is no mention of the mandatory will in the Algerian law under that name, but identical provisions are enacted under the heading '*Tanzeel*' according a grandchild the status of a child for the purposes of inheritance.[103] The same expression, with similar provisions, is used in the Moroccan law.[104] However, *tanzeel* here could apply to any person, not necessarily a grandchild, who the testator wishes to be treated as an heir of his but who is in fact a beneficiary of a will. Kuwaiti law has also adopted the doctrine of mandatory will as third in priority of charges on the estate, following funeral expenses and debts of the deceased and preceding voluntary wills and distribution of heirs' shares.[105]

Notwithstanding the criticism of the doctrine of mandatory will, it cannot be denied that it has contributed considerably to ameliorate the lot of hapless orphaned grandchildren who, previous to the above mentioned reforms, were generally left high and dry. However, this problem has been discussed at length in an earlier chapter of this book.

Notes

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43. Supra, Note 24, p. 133.
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45. Article 35.
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55. Algerian, Article 188.
56. Egyptian Will Act, Article 17; Syrian, Article 223.
57. Egyptian Will Act, Article 17; Kuwaiti, Article 227.
58. Supra, Note 1, p. 767.
59. Supra, Note 50, p. 213.
60. The English rendering of the tradition is taken from the book of Tayyabji, Supra, Note 1, p. 764-765.
61. Ihsan Ilahi v Hakam Jan, PLD 1967 S.C. 200.
62. Muhammad Tufail v Atta Shabbir, PLD 1977 S.C. 220.
63. Supra, Note 8, p. 270.
64. Shaikh Abdul Latif v Shaikh Elias Bux, (1915) 1 C.M.S.L.R. 204, cited by Ahmad Ibrahim in his book, *Islamic Law in Malaya*, Malaysian Sociological Research Institute, Singapore, 1965, p. 267-268.
65. Supra, Note 8, p. 270.
66. Fazal Muhammad v Chohara, 1992 SCMR 2182; Muhammad Tufail v Atta Shabbir, PLD 1977 S.C. 220; Ihsan Ilahi v Hukam Jan, PLD 1967 S.C. 200; Ghulam Muhammad v Ghulam Husain (1932) 59 I.A. 74 = 136 I.C. 454; Muharam Ali v Barkat Ali, (1931) 12 Lahore 286 = 125 I.C. 884.
67. Muhammad Ata Husain v Husain Ali, (1944) 216 I.C. 276.
68. Articles 176 and 179/d, Moroccan.
69. Article 37, Egyptian Will Act.
70. Article 238/2, Syrian; Article 189, Algerian; Article 179, Tunisian.

71. Article 70, Iraqi.
72. This view has been incorporated in the laws of Lebanon (Article 148) and Syria (Article 307/a) for Druze population.
73. Siti v Mohammad Noor, (1928) 6 F.M.S.C.R. 135, cited by Ahmad Ibrahim, Supra, Note 64, p. 268.
74. N.B.E. Baillie, *A Digest of Mohammadan Law*, 1865, London: Premier Book House, p. 624.
75. Supra, Note 8, p. 270.
76. Ibid.
77. Supra, Note 1, p. 771.
78. Article 10, Egyptian Will Law.
79. Articles 222, 216(a), Kuwaiti.
80. Article 216, Syrian.
81. Article 69, Iraqi.
82. Article 190, Algerian.
83. Article 188, Moroccan.
84. Supra, Note 1, p. 759.
85. Supra, Note 15, pp. 117-118.
86. Supra, Note 1, p. 777.
87. Ibid., pp. 779-780.
88. Supra, Note 10, p. 194.
89. Roland Kayvet Wilson, *Muhammadan Law - A Digest*, 6th edn., by A. Yusuf Ali, 1928, p. 318.
90. Muhammad Ramzan Khan v Muhammad Hafeez Khan, 1977 SCMR 302.
91. Supra, Note 10, p. 131.
92. Supra, Note 51, p. 222.
93. Supra, Note 89, p. 313.
94. Ibrahim Goolam Ariff v Saiboo, (1908) 35 Calcutta 1.
95. Chanan Bibi v Muhammad Shafi, PLD 1977 S.C. 28.
96. Explanatory Note to the Egyptian Will Act No. 71/1946.
97. Egyptian Will Act No. 71/1946, Article 76.
98. Ibid., Article 77.
99. Ibid., Article 78.
100. Supra, Note 8, p. 272.
101. The Quran, *Surah Al Baqarah*:2:180.
102. Chapter 5, Article 257, para 1/a, b and c; Syrian. Article 74, paragraphs 1 and 2 of Law No. 180/1959 as amended by Law No. 72/1979; Iraqi. Articles 191 and 192 of Law No. 77/1959 dated 19 June 1959; Tunisian. Article 182, Jordanian.
103. Book Three: On Inheritance, Chapter Seven, 'Tanzeel'. Articles 169-172 inclusive, Law No. 84-11/1984; Algerian.
104. Article 83, paragraph 3 of Chapter VII of the fifth Book (on Wills); also Articles 212 to 215 inclusive; Moroccan. Also Articles 266 to 269 inclusive of Chapter VII incorporating all provisions of the Egyptian law regarding mandatory will.
105. Article 291, Kuwaiti.

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